

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:

Application of Cellco Partnership d/b/a
Verizon Wireless and SpectrumCo LLC
For Consent To Assign Licenses

WT Docket No. 12-4

Application of Cellco Partnership d/b/a
Verizon Wireless and Cox TMI Wireless, LLC
For Consent To Assign Licenses

REPLY COMMENTS OF BOSTON, MASSACHUSETTS

Boston, Massachusetts (the “City”), files these reply comments in the above-captioned proceeding to express the City’s opposition to the Applications and the related Commercial Agreements entered into between the Applicant Verizon Wireless and the cable operator Applicants.¹ The City urges the Commission to deny the Applications, and to exercise its authority— in this proceeding and/or by initiating a separate proceeding – to halt the implementation of the related Commercial Agreements. The City strongly believes that the Applications and related Commercial Agreements create significant disincentives for Verizon to make future investments in its FiOS fiber network which will harm consumers, particularly in the Boston area which lacks robust competition and investment in wireline broadband services. It is due to this lack of competition that the City filed an Emergency Petition for Recertification² last year, seeking to reinstate the City’s rate regulation authority, and we urge the Commission to

¹ Applications were filed on December 16, 2011 by Cellco Partnership d/b/a Verizon Wireless (“Verizon Wireless”) and SpectrumCo, LLC (“SpectrumCo”), and on December 21, 2011 by Verizon Wireless and Cox TMI Wireless, LLC, a subsidiary of Cox Communications, Inc. (“Cox”), to assign spectrum licenses held by SpectrumCo and Cox Wireless to Verizon Wireless. *See also, Public Notice*, DA-12-67, WT Docket No. 12-4 (rel. Jan. 19, 2012); *Order*, DA-12-367, WT Docket No. 12-4, (rel. Mar. 8, 2012).

² City of Boston, Massachusetts, Emergency Petition for Recertification, CUID No. MA0182, filed May 9, 2011. (“Emergency Petition”). A copy of the Emergency Petition is attached hereto as Exhibit A. See discussion, *infra*.

act on that petition as well. Finally, we believe the arrangements between Verizon Wireless and the cable operators are anti-competitive, unlawful, and not in the public interest.

I. THE CITY OF BOSTON IS A STRONG PROPONENT OF BROADBAND DEPLOYMENT

Boston is a world-class city whose major industries include innovative technology, research, healthcare, education and hospitality. These industry sectors demand access to broadband to grow and succeed in their respective fields and their customers expect nothing less. Affordable broadband is critical to economic development, quality of life, and opportunity for the residents and small businesses in our City.

The City of Boston has actively advocated for broadband investment and video competition throughout our city and particularly in under-served and lower-income neighborhoods. We encourage the introduction of new technologies and competition through innovative policies and investments. For example:

- The City has invested over \$18 million over the last five years in our city fiber network to support broadband for use by constituent services and our public schools.
- The City developed informal and expedited franchising processes. In Boston, we renew, transfer, amend and dissolve franchises, quickly, as the situation(s) warrant, in order to be responsive to changes in law, regulation and/or market conditions.
- Boston has taken the lead in piloting an affordable wireless solution for our residents through the Boston Wi-Fi Project.
- The City streamlined access for broadband and wireless telecommunications businesses seeking to provide services to Boston's residents and businesses, establishing a single point of entry for telecommunications services applicants.

- We have negotiated agreements with providers such as RCN, Next G, American Tower and Extenet in order to introduce some measure of competition and new technologies in wireless communications.
- Boston is in the midst of an aggressive Boston Technology Opportunity Program designed to reach schoolchildren and families in need of technical skills and training, thanks to funding support from the American Recovery and Reinvestment Act.

Collectively, all of these efforts are designed to provide our citizens, neighborhoods and businesses with the resources necessary to succeed in a digital economy. Vital to our efforts is the development of a healthy and competitive market for broadband.

II. BOSTON LACKS A ROBUST AND COMPETITIVE MARKET FOR WIRELINE BROADBAND AND VIDEO SERVICES

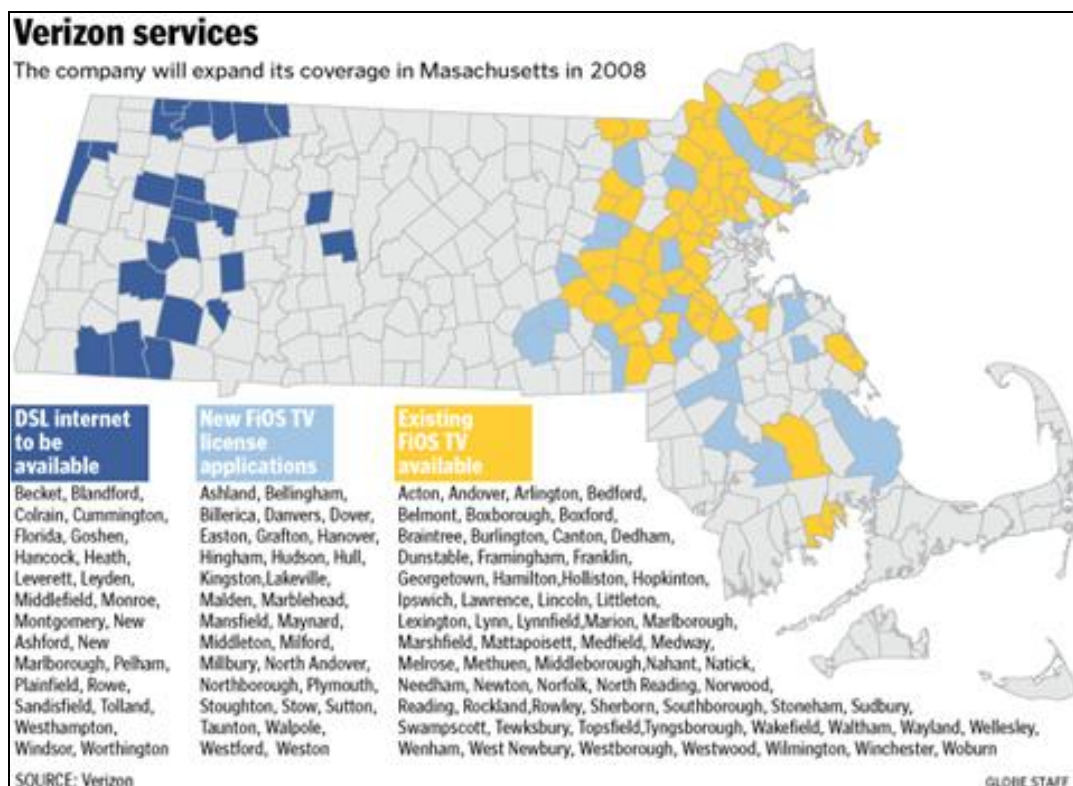
Verizon is the predominant landline telephone company serving the Boston area, and Comcast is the predominant cable operator. We at the City understand that advanced communications networks hold out the promise of video competition and the potential benefit to consumers of lower prices, improved customer service and new, expanded video and broadband services. Thus, when Verizon announced plans for the launch of its “nationwide” FiOS fiber built out, the City and its residents welcomed the news, knowing that in the past, cable companies rushed to build systems in densely populated cities and larger towns.

Unfortunately, Verizon chose not to build out its fiber network to offer FiOS services in Boston. Verizon, instead, focused its investment on securing cable franchises in lower density, suburban communities surrounding Boston. As Verizon invested in its fiber network in suburban communities to offer competitive digital TV services, VoIP and faster Internet speeds, it also launched an aggressive regional marketing campaign. Boston residents, attracted by these advertised choices and competitive prices, cannot understand why these options are not available

to them. Residents, frustrated with the lack of competition for cable services and skyrocketing prices, often call City Hall to complain.

The City reached out to Verizon repeatedly to discuss with company leadership the need for upgrades and new services over the last eight years, looking for any opportunity to negotiate a Verizon FiOS cable franchise. Our purpose has been to build a mutual dialogue to accommodate Verizon's entry in the new video market in order to bring more competition and increased broadband service offerings to Boston residents.

There is no compelling need to amend laws or avoid regulation; companies can do business in Boston at lightning speed. Yet, Verizon has declined the City's invitations to enter into cable franchise negotiations.



As illustrated in the preceding Boston Globe chart published in February, 2008,³ Verizon chose to build out its FiOS network in the yellow and light blue areas which represent suburban communities. It chose *not* to provide FiOS service in Boston and all surrounding urban communities. Hence, a number of residents in those communities rightly perceive Verizon to be redlining, or at the very least cherry-picking. As the statewide map displays, urban Greater Boston is the hole in the Verizon FiOS donut.

Verizon's decision to bypass Boston in favor of surrounding suburban communities disproportionately affects minority and lower-income neighborhoods, small businesses, and seniors. It can have a deleterious effect on the ability to attract jobs and promote growth into the urban ring. We fear that without the broadband infrastructure and robust competition envisioned in the Telecommunications Act of 1996, Boston, and the urban communities of eastern Massachusetts will suffer economically.

III. THE SPECTRUM ASSIGNMENT AND RELATED COMMERCIAL AGREEMENT WILL ONLY WORSEN THE SITUATION BY DETERRING BROADBAND DEPLOYMENT AND VIDEO COMPETITION IN BOSTON

Our concerns about the lack of broadband deployment and video competition in the Boston area are heightened by the deal that has been struck between Comcast and Verizon's subsidiary, Verizon Wireless. The Commission has before it two Applications to assign spectrum licenses held by SpectrumCo (owned by Comcast, Time Warner Cable and Bright House) and by Cox Wireless to Verizon Wireless. The Applicants describe their transaction(s) as involving "only assignments of spectrum."⁴ However, the proposed spectrum sale is linked to

³ Johnson, Carolyn Y., "Paying a Bundle for Cable Upgrade," The Boston Globe, Business Section, February 29, 2008.

⁴ Public Interest Statement, attached to Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo, LLC, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4, ULS File No. 0004993617 at 24 n.71 ("Verizon/SpectrumCo Public Interest Statement"). *See also* Public Interest Statement, attached to Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4, ULS File No. 0004996680, at p. 1.

commercial agreements (“Commercial Agreements”) with Verizon Wireless to sell each other’s services and the formation of a Joint Operating Entity (JOE) “to develop innovative technology and intellectual property that will integrate wired video, voice and high-speed Internet with wireless technologies.”⁵ Presumably, the intent of the JOE is to manage the development of products, standards technology and intellectual property. The Applicants emphasize that the transaction will allow Verizon Wireless to add network capacity to meet growing demand for high quality wireless broadband.⁶ Over the past year, Verizon has also signaled to customers and investors that their FiOS expansion and deployment is ending.

The City believes that the Applications, if granted on the terms sought by the Applicants, will leave the city of Boston permanently on the wrong side of the digital divide. The City does not oppose improvements to wireless broadband – to the contrary - as mentioned earlier, the City is actively encouraging wireless and WiFi deployments.

The City’s concern is with the inevitable impacts for Boston residents in terms of wireline broadband deployment and video competition if the Commission approves these Applications and allows the companies to implement the joint marketing and technology development arrangements contemplated by the related Commercial Agreements. We believe that the new joint Verizon/Cable marketing agreement linked to this spectrum transfer will negatively impact any future FiOS investment by Verizon and any further fiber network expansion by Verizon Wireless’ new partner, Comcast. On the one hand, Verizon will have committed its capital expenditure to its wireless division, not FiOS. And, on the other hand, Comcast will essentially partner with its competitor, thereby removing any threat to its existing infrastructure.

⁵ Verizon Wireless/SpectrumCo Public Interest Statement, at 24 n.71.

⁶ *Id.*, p. 1.

Put simply, the City is concerned that these transactions are designed to ensure that Verizon and Comcast collaborate and never compete in Boston, thereby effectively depriving our communities, citizens, small businesses, schools, hospitals and educational facilities the benefits of video and broadband competition that is available in most of eastern Massachusetts' surrounding suburbs and in other parts of the country.

The future harmful effects of the proposed alliance of Verizon and Comcast are not a matter of idle speculation; they are the logical consequence of the continuation of the existing harms that have already been documented and provided to the Commission by the City in its Emergency Petition for Recertification of the City of Boston to Regulate Basic Subscriber Rates, filed in May, 2011 ("Emergency Petition").⁷

In short, the competitive market for video services in Boston did not develop in the way the Commission anticipated in its "effective competition" order, and the City believes that the finding of effective competition in Boston should be reversed. That is the reason for filing the Emergency Petition. The Emergency Petition is relevant to the present proceeding as well because it provides clear and compelling evidence of the consumer harms happening now in the City of Boston due to lack of robust competition, which will only get worse if Comcast and Verizon are permitted to join forces.

When Comcast increased their Basic Rate by 18% last year, it was the third straight year of increases totaling more than 60% on an entry level service that is supposed to provide an affordable option to consumers. These massive increases in basic service rates are what led the Mayor's Office of Cable, Video and Web Services to commission a detailed study of Comcast's Basic Rates. The study found that in the period from 2008 through 2011, Comcast collected from Basic Service customers in Boston approximately \$24 Million **more** than Comcast charged

⁷ See Emergency Petition attached hereto as Exhibit A.

Basic Service customers in neighboring communities.⁸ Moreover, the cable subscribers in Boston are not experiencing the increased number of channels typically being offered when a competitive service like FiOS is available, as recently noted by the FCC in its Report on Cable Industry Prices (DA 12-377). We believe that the price discrepancies and limited service offerings experienced by Boston residents are a consequence of the city of Boston not being a competitive cable market.

While granting the City's Emergency Petition would go some measure to improve the situation by permitting the City to regulate basic cable rates, regulation is a second best solution in the absence of a truly competitive market for cable and broadband services. Yet, if Verizon and Comcast are permitted to pursue joint economic interests as contemplated in the present Application and related Commercial Agreements, it is very unlikely that that cable subscribers in Boston will ever experience the benefits of effective competition.

IV. THE ASSIGNMENT NOT IN THE PUBLIC INTEREST

The City believes the spectrum assignment is not in the public interest. Just last week, the Subcommittee for Antitrust, Competition Policy and Consumer Rights of the Senate Judiciary Committee held a hearing titled, "The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?" Susan P. Crawford, a visiting professor at the Harvard University's Kennedy School of Government and Law School, commented on the Verizon/Cable deal in a national Bloomberg News column entitled, "Verizon to the Cable Industry: Let's Be Friends."⁹ She suggested that a better question for the hearing title would be: "Why isn't the American public paying closer attention?" She also wrote: "Like water and

⁸ "Report to the City of Boston Regarding Comcast's Basic Service Cable Rates," prepared by Front Range Consulting, Inc., April 2011 and submitted as Exhibit 3 to the Emergency Petition.

⁹ Crawford, Susan P. "Verizon to the Cable Industry: Let's Be Friends" published at <http://www.bloomberg.com/news/2012-03-20/verizon-to-the-cable-industry-let-s-be-friends.html> (last accessed 3/26/2012).

electricity services, these are natural monopoly businesses characterized by crushing advantages of scale, high upfront investments and sharply declining costs for additional customers. Unlike other utilities, however, the wireless guys and the cable companies are essentially unregulated.”

The City shares Professor Crawford’s concerns that Verizon and the partnering cable entities, who jointly control 40% of the country’s wireless, video and residential broadband markets, are essentially unregulated, and will be able to jointly engage in developing future technologies that ultimately will become industry standard to the detriment of any competitor.

Further, the City supports the legal arguments of consumer and public interests organizations¹⁰ and numerous other filers that demonstrate that (i) the Commercial Agreements violate provisions of the Communications Act, including 47 U.S.C. § 572 (concerning joint ventures among cable operators and telephone companies) and 47 U.S.C. § 548 (concerning unfair methods of competition or unfair or deceptive acts or practices) and (ii) the Commission has ample authority to take enforcement measures under those provisions.¹¹

V. CONCLUSION

The spectrum transfers proposed in the Applications and the related Commercial Agreements will harm consumers in Boston and are not in the public interest. The City urges the Commission to deny the Applications, and to take such other enforcement actions as the Commission deems necessary to halt the implementation of the Commercial Agreements. The City also urges the Commission to act on its Emergency Petition.

¹⁰ Petition to Deny of Public Knowledge, Media Access Project, New America Foundation, Pen Technology Initiative, Benton Foundation, Access Humboldt, Center for Rural Strategies, Future of Music Coalition, National Consumer Law Center, on Behalf of Its Low-Income clients, and Writers Guild of America, West. filed Feb. 21, 2012, WT Docket No. 12-4, p. 5 (“Petition to Deny”).

¹¹ Petition to Deny at pages 36, 41-42, 45-46; RCA - The Competitive Carriers Association Petition to Condition or Otherwise Deny Transactions filed in WT Docket No. 12-4 on February 21, 2012 at page 41; Petition to Deny of the Rural Telecommunications Group, Inc. filed in WT Docket No. 12-4 filed on February 21, 2012 at page 8.

In the event that the Commission looks favorably toward granting the Applications and transaction(s), the City urges the Commission to include, as a condition for approval, a requirement that Verizon continue to invest in and build-out its FiOS network to currently unserved and under-served areas that are inside its traditional telephone service area footprint, including the city of Boston and other urban communities.

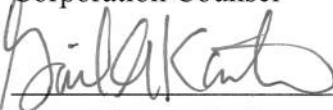
March 26, 2012

Respectfully submitted,

Mayor Thomas M. Menino
CITY OF BOSTON, MASSACHUSETTS

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EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)

) **Docket No.** _____
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City of Boston, Massachusetts)
Petition for Recertification)
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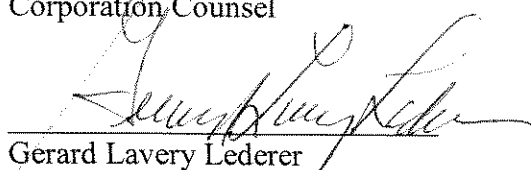
) **Boston, MA**
)

) **CUID NO. MA0182**
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**EMERGENCY PETITION FOR RECERTIFICATION OF THE CITY OF BOSTON
TO REGULATE BASIC SUBSCRIBER RATES**

CITY OF BOSTON, MASSACHUSETTS
By its attorneys,

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Counsel for the City of Boston, Massachusetts

May 9, 2011

SUMMARY
CITY OF BOSTON EMERGENCY PETITION FOR RECERTIFICATION

Pursuant to 47 C.F.R. § 76.916, the City of Boston hereby files a Emergency Petition for Recertification for the purpose of reassuming jurisdiction to regulate basic service and associated equipment rates. The City meets the requirements set forth under 47 U.S.C. § 543(a) (3), and the City is not subject to effective competition. The reasons for the Commission's 2002 revocation of the City's regulatory jurisdiction, *i.e.*, that Cablevision had demonstrated effective competition from RCN under 47 C.F.R. § 905(b)(4)¹, the fourth effective competition test (the "LEC test") no longer exists, nor would the City assert has it ever existed under the Commission's LEC test.

The Commission's LEC test requires that a competitor not only be a LEC, or affiliated with a LEC, but that the:

1. LEC intends to build-out its cable system within a reasonable period of time if it has not completed its buildout;
 2. No regulatory, technical, or other impediments to household service exist;
 3. LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased;
 4. LEC has actually begun to provide services and an analysis of the equivalent nature of such services, including the ease with which service may be expanded;
- and

¹ (4) A local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services

5. Expected date for completion of construction in the franchise area.²

In the instant matter, the City will show that a search of Massachusetts records following a corporate restructuring in 2010 fails to reveal a LEC designation of RCN or any of its corporate colleagues, an affiliation that was the basis of the 2002 decision. Furthermore, should the Commission find that RCN still meets the definition of a LEC or LEC affiliate, RCN does not meet prongs 1, 3 and 4 of the FCC's LEC test in the vast majority of the Boston cable franchise market, and therefore Comcast is not subject to effective competition under the FCC's LEC test.

- RCN's system currently serves only a limited geographic area of the City.
RCN is under no legal obligation to expand its system throughout the rest of the City. RCN has not given the City any assurance that will be able to acquire the capital necessary to expand its system to serve any new areas of the City within the foreseeable future
- RCN, under its current OVS agreement with the City, is neither obligated nor intends to build out the entire Boston franchise area. It therefore never intends to offer customers an equivalent service or choice that serves as a marketplace regulator on the price of basic service and equipment rates. Furthermore, Boston will demonstrate that the Commission's prior decisions in this matter have cost Boston basic tier consumers \$24 million over the last 4 years when measured against the rate Comcast charges basic tier consumers in

so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

² See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305-06, ¶¶ 13-16 (1999) ("Cable Reform Order").

neighboring communities that have not been found by the Commission to be subject to effective competition.

While there has been a change in the basis for the findings of effective competition, there has been no change in Boston consumers' need for protection. In a study commissioned by the Mayor's Office of Cable, Video and Web Services, a copy of which is attached to the Petition as Exhibit 3, Front Range Consulting, Inc. ("FRC"), , found Comcast has collected from Basic Service customers approximately \$24 Million more than it charged neighboring Basic Service customers over the time period of 2008 through 2011.

For these reasons, the Commission should immediately find that the City of Boston is not subject to effective competition so that the City might work with the Massachusetts Department of Telecommunications and Cable Regulation to regulate basic service and associated equipment rates.³ The competitive market did not develop in the way the Commission anticipated and a recent survey by Front Range Consulting, Inc. demonstrates that "Basic Tier Subscribers" in Boston are paying significantly more than "Basic Tier Subscribers" in neighboring communities. The Commission's decertification of the City, coupled with the failed promise of effective competition, has left the majority of subscribers in the City unprotected from Comcast's market power. An immediate

³ Under the laws of the Commonwealth of Massachusetts, while the City of Boston is the franchising authority, the legislature has reserved rate regulation for the Department of Telecommunications and Cable referenced in the Code as the "Commission." (*See* 207 CMR 6.02 *et seq.*) The Code has been reproduced and attached to Exhibit 1, the Declaration of Michael Lynch, Director of Mayor's Office of Cable, Video & Web Services. Under 207 CMR 6.04, "The Commission [Department] shall, consistent with FCC regulations, regulate the basic service tier and equipment rates:

(1) At the request of an issuing authority...."

restoration of regulatory authority is therefore necessary to protect subscribers and fulfill the Commission's mandate under the Cable Act.

The City cannot make such a request, however, until the FCC has declared that the market is not subject to effective competition.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of:)	Docket No. _____
)	
City of Boston, Massachusetts)	Boston, MA
Emergency Petition for Recertification)	CUID No. MA0182
)	
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Pursuant to 47 C.F.R. § 76.916, the City of Boston, Massachusetts (“City”) hereby files a Emergency Petition for Recertification for the purpose of immediately reassuming jurisdiction to regulate basic service and associated equipment rates.⁴

The City is not now subject to effective competition determination made by the FCC under the LEC test. Thus, the City meets the requirements set forth under 47 U.S.C. § 543(a)(3). The future construction obligations which formed the basis the Commission’s 2002 revocation of the City’s regulatory jurisdiction no longer exists, nor does the LEC affiliation that was so integral to the Commission earlier findings. Therefore, the Commission should immediately recertify the City to regulate rates.

⁴ Copies of the Commission’s earlier decisions revoking certification on the basis of effective competition are attached as Exhibit 2. Also, for simplicity, the Petition talks in terms of the City of Boston being recertified to regulate rates, but under the laws of the Commonwealth of Massachusetts, while the City of Boston is the franchising authority, the legislature has reserved rate regulation for the Department of Telecommunications and Cable referenced in the Code as the “Commission.” (*See* 207 CMR 6.02 *et seq.*) Under 27 CMR 6.04 the City has the right to petition the Department to regulate the basic service tier and equipment rates. The City cannot make such a request, however, until the FCC has declared that the market is not subject to effective competition.

I. BACKGROUND

Comcast Corporation (“Comcast”) is the incumbent cable operator in the City. Cablevision of Boston (“Cablevision”) and AT&T Broadband of Boston are Comcast’s predecessors-in-interest.⁵ In February 1997 RCN-BecoCom, LLC (“RCN”) also began to provide multichannel video service in limited areas of the City. RCN at the time of the original petitions in this matter was a joint venture between Boston Edison Company and Residential Communications Network of Massachusetts, Inc. Today, RCN is a wholly owned subsidiary Yankee Cable Acquisition LLC and ultimately, ABRY Partners VI LP.

A. Cablevision’s State and Federal Court Attempts to Prevent Competition in Boston.

Comcast and its successors have provided cable service in the City since 1982. For most of that period, these entities have been the only cable service provider available to City residents. In 1999, seeking to enable and encourage competition in the multichannel video market, the City entered into an agreement with RCN to authorize the construction of a competing system. At that time, RCN anticipated that it would buildout its system as follows:

YEAR	ADDITIONAL HOMES PASSED	CUMMULATIVE HOMES PASSED
1999	20,811	20,811
2000	72,444	93,255
2001	88,251	181,506
2002	83,604	256,110

⁵ The City renewed Cablevision of Boston, Inc.’s nonexclusive, revocable license to construct, install, operate, and maintain a Cable Television System in Boston on May 11, 1998. Cablevision transferred its right, title and interest in the License to AT&T Broadband on or about January 5, 2001. The City approved a transfer of the Boston license to AT&T Comcast on July 17, 2002. AT&T Comcast subsequently changed its name to Comcast in the New England area on February 18, 2003. “*Comcast Brand Officially Takes Over AT&T*,” Boston Business Journal, Feb. 18, 2003, *available at* <http://boston.bizjournals.com/boston/stories/2003/02/17/daily15.html> (last visited Sept. 29, 2003). On October 8, 2010 Comcast’s franchise was renewed for an additional five years (October 8, 2015).

TOTAL 256,110

The City's efforts to encourage competition have faced continued resistance from the cable industry. On November 7, 1997, Cablevision commenced litigation in state court seeking to invalidate the formation of the RCN joint venture. Dismissal of Cablevision's suit was affirmed by the Massachusetts Supreme Court on December 8, 1998.⁶ On December 14, 1998, one week after its state suit was dismissed; Cablevision filed in federal court a motion for preliminary injunction seeking to prohibit the City from granting RCN permission to construct a cable system within the City. The District Court dismissed Cablevision's motion, and the U.S. Court of Appeals for the First Circuit affirmed the District Court's decision on August 25, 1999.⁷ These legal actions helped to delay the arrival of a competitive cable service provider in Boston.

B. Cablevision's Effective Competition Challenge.

1. 1997: The Effective Competition Petition.

As part of the City's effort to encourage competition, on June 2, 1997, the City entered into an Interim Open Video System ("OVS") Agreement with RCN to permit RCN to begin constructing a multichannel video system in the City.⁸ This arrangement was intended to expedite the necessarily time-consuming process of constructing a competitive system while the City and RCN negotiated a cable license agreement.⁹

⁶ *Cablevision Systems Corp. v. Dep't of Telecomm. & Energy*, 702 N.E.2d 799 (Mass. 1998).

⁷ *Cablevision v. Pub. Improvement Comm'n*, 38 F. Supp. 2d 46 (D. Mass. 1999) *Cablevision v. Pub. Improvement Comm'n*, 184 F.3d 88 (1st Cir. 1999).

⁸ See also *In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition*, Petition for Special Relief, CSR 5048-E (filed Jul. 14, 1997), at n.34 ("*Cablevision Effective Competition Petition*").

⁹ In Massachusetts, the Cable Division of the Massachusetts Department of Telecommunications and Energy is technically the franchising authority for all CUIDs in Massachusetts and is responsible for rate regulation. As reflected in 207 CMR 6.00 reproduced as Exhibit A to the Declaration of Michael Lynch, Director of Mayor's Office of Cable, Video & Web Services, local governments may petition the Massachusetts Cable Television Division

On July 14, 1997, just six weeks after RCN obtained permission to begin construction within the City, Cablevision filed a petition for declaratory ruling, asking the Cable Bureau to declare that effective competition existed in the City and asking the Bureau to suspend the City's jurisdiction to regulate basic service and equipment rates. The City opposed Cablevision's 1997 Petition on grounds that RCN did not have a built-out system capable of offering service throughout the City, and thus a declaration of effective competition would be premature.¹⁰ The Bureau chose to take no action on the Cablevision petition for four years.

2. 1999: The RCN License Agreement.

The City entered into a License Agreement with RCN on July 27, 1999. The License Agreement stated that RCN would build out approximately 20% of its cable plant, passing just under 8% of the single family homes and MDUs in the City, by the end of 1999. It also provided that RCN would complete construction of a total of 886 miles of plant to pass 265,110 total homes by the end of 2002.

On August 3, 1999, Cablevision submitted the new RCN License Agreement to the Bureau as a supplemental filing supporting its original effective competition petition.¹¹ The City once again opposed Cablevision's assertions that effective competition existed, contending that

Regulation, for a hearing on rates. Local governments, however, issue cable and telecommunications "license agreements," and are responsible for monitoring the performance of cable operators and enforcement of license agreements. For purposes of this Application, the terms "license agreement" and "franchise agreement," as well as "license area" and "franchise area," are used interchangeably.

¹⁰ *Cablevision Effective Competition Petition; In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition*, Letter in Opposition to Petition for Special Relief, CSR 5048-E (filed by the City Aug. 8, 1997); *In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition*, CSR 5048-E, Reply to Opposition to Petition for Special Relief (filed by Cablevision Aug. 27, 1997).

¹¹ *In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition*, Letter from Christopher Harvie, Cablevision, to Deborah Lathen (filed by Cablevision Aug. 3, 1999) ("Cablevision 1999 Supplement"); *see also* Letter from Christopher Harvie to Deborah Lathen (filed by Cablevision Sept. 9, 1999) ("Cablevision 1999 Reply").

the License Agreement entitled RCN to build out its cable system but did not show that RCN was offering service in competition with Cablevision throughout the City. As RCN was providing service to a very limited number of homes in August 1999, the City again asserted that a declaration of effective competition would be premature.¹² The Bureau again took no action on the Cablevision petition in 1999.

3. 2000: Capital to Finance New System Construction Becomes Unavailable to RCN.

By March 2000, the market capital that had been relatively easy for telecommunications and Internet start-up companies to acquire in the four years after the passage of the Telecommunications Act of 1996 began to dry up.¹³ In Boston, the local press began reporting that RCN would not build out its system as quickly as previously thought, because the necessary capital was becoming scarce.¹⁴ Using information submitted in 2000, the Commission's *Seventh*

¹² *In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition*, Letter from Charles Beard, City of Boston outside counsel, to Deborah Lathen, Cable Services Bureau Chief (filed by City Aug. 26, 1999) ("Boston 1999 Opposition").

¹³ See, e.g., Richard Waters, *CLECs Prepare for a Rough Ride in the Financial Markets: Competitive Local Exchange Carriers are Scrambling To Cut Spending as Investors and Lenders Become Skittish*, Financial Times (London), at 38 ("Most are now scrambling to cut spending and bring forward the point at which they can report a profit"); Mavis Scanlon, *RCN: After the Fall*, Cable World, Jan. 1, 2001 ("The pull back in the capital markets 'definitely' is going to effect every overbuilder"); Lee Bergquist, *New Cable Company Pulling Plug; Digital Access Cites Inability to Raise Capital*, Milwaukee Journal Sentinel, Mar. 3, 2001, at 1D ("when financing is drying up for many companies that want to build cable systems in markets where there is existing cable operator.")

¹⁴ See, e.g., Andrea Estes, *For Cable Rival, No Room at the Poles: Current Utility Providers Reluctant to Add RCN*, The Boston Globe, Dec. 17, 2000, at 1 (South Weekly Ed.) ("But now – two years after RCN signed deals with Quincy, Weymouth, and Randolph – RCN officials last week said they aren't even close to being ready to go."); Tom Kirchofer, *Media Upstart Fires 65*, The Boston Herald, Jan. 23, 2001, at 25 ("RCN spokeswoman Nancy Bavec said "...we're going to be expanding in the Boston market at a lesser rate of growth than previously"); Len Boselovic, *AT&T Woes Hurt C-COR Stock's Reception*, Pittsburgh Post Gazette, Jan. 8, 2001, at B-7 ("RCN Corp. (RCNC) announced last month it would spend only about \$775 million next year, 50 percent lower than its original budget"); Bruce Mohl, *Cable TV Mergers Delaying Rate Hikes, Big Firms Have Yet To Announce Plans for Coming Year*, Dec. 26, 2000, at C1 ("RCN, which is building a network from the ground up in Greater Boston, has been experiencing financial difficulties lately").

Annual Report on competition in the video programming market reported that local exchange carriers generally “had reduced or eliminated their MVPD efforts.”¹⁵ The *Seventh Report* specifically discussed the impact of capital scarcity on RCN, stating:

RCN recently announced, however, that it was not going to launch or seek new franchises or open video systems in response to tighter capital markets. It will instead concentrate on buildout and increasing penetration in existing systems.¹⁶

Thus, by the end of 2000, the Commission was well aware of RCN’s growing inability to raise the capital necessary to finance expansion of any of its municipal systems. The Bureau again took no action on the effective competition petition in 2000.

4. 2001: The Bureau Declares Effective Competition Based on Construction Obligations RCN Had Failed to Meet.

a. RCN’s March 2001 Construction Report to the City.

Construction reports and public testimony submitted by RCN to the City mirrored the comments submitted by RCN to the Commission. In a public hearing before City officials on March 14, 2001, RCN’s Vice-President and Regulatory Counsel, Thomas Steel, estimated that it would take \$250 million, which represented 14.7% of *all of RCN’s parent company’s cash reserves*, to build out the Boston system in its entirety.¹⁷ Mr. Steel acknowledged RCN’s difficulties in raising capital and bluntly stated that RCN would not be able to meet its buildout

¹⁵ *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, CS Docket No. 00-132, 16 FCC Rcd 6005, 6061 at ¶ 120 (2001) (“*Seventh Report*”).

¹⁶ *Seventh Report* at 6061 n.441, citing RCN, *RCN Outlines 2001 Plans for Growing Its Local Broadband Business* (Press release), Dec. 21, 2000.

¹⁷ See Thomas Steel, Vice-President and Regulatory Counsel for RCN, Testimony at Annual Performance Review of RCN BECO LLC at 21-22 (March 14, 2001) (“*RCN 2001 Performance Review*,” attached as Exhibit 2 to City’s *Application for Review*); 2000 RCN Annual Report at 3, available at http://www.rcn.com/investor/rcn_annual-report/index.html (“*2000 RCN Annual Report*”).

schedule: “[In the] short term you are not going to see us in 2001 doing a lot of work throughout the rest of the City.”¹⁸

RCN’s statements to the City mirrored what RCN had reported to the Commission for the *Seventh Report*. Mr. Steel stated that RCN’s goal would be to:

take the parts of a community such as Boston where we can construct quickly and affordably and get a revenue stream going, and in effect not spend any more money . . . and if we can get our business plan clearly sold on Wall Street, then we can go forward again with a much more aggressive and advanced construction plan.¹⁹

Finally, RCN reported to the City that through March 2001, RCN had activated cable plant passing only about 35,000 homes – less than half of the 72,444 homes that should have been activated by the end of the previous year, 2000, and less than thirteen percent of the 265,110 homes RCN was then contractually obliged to pass by 2002.

b. The Bureau’s July 2001 *Cablevision Order*.

Four months after the City’s public hearing, on July 20, 2001, the Cable Bureau released a Memorandum Opinion and Order, granting the 1997 Cablevision Effective Competition Petition (“*Cablevision Order*”).²⁰ The Bureau’s *Cablevision Order* stated that Cablevision had demonstrated effective competition from RCN under 47 C.F.R. § 905(b)(4), the fourth effective competition test (the “LEC test”). The Bureau rejected the City’s arguments that it would be premature to determine that effective competition existed in the Boston market, and dismissed the City’s arguments that RCN was not “offering service” and providing effective competition as

¹⁸ *RCN 2001 Performance Review* at 29.

¹⁹ *RCN 2001 Performance Review* at 20-21.

²⁰ *In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition*, Memorandum Opinion and Order, CSR 5048-E, DA 01-1731, 16 FCC Rcd. 14056 (July 20, 2001) (“*Cablevision Order*”). The Bureau’s *Cablevision Order* was released four years after Cablevision filed its initial petition, almost two years after the parties last refreshed the record, and without any request by the Bureau to update the record to reflect the changes in the industry that the Commission itself had noted in the *Seventh Report*.

defined under the Commission's rules.²¹ The Bureau justified its effective competition determination primarily based on the anticipated construction RCN was obliged to provide under its 1997 License Agreement:

This long term franchise requires RCN to serve approximately 90% of Boston within 3 1/2 years of signing the franchise agreement, and complete its buildout to every Boston neighborhood six years after signing the franchise agreement.²²

In particular, we note the aggressive buildout requirement and liquidated damage provisions of the franchise indicating that our finding is not premature.²³

The Bureau also drew on 1999 and 2000 press reports of "millions of dollars in infrastructure development" RCN was expected to invest to provide service to Boston and surrounding communities:²⁴

"RCN plans to build a \$250 million network capable of serving all residents of the city by the end of 2002."²⁵ [*Boston Globe*, 1999]

"Paul Allen reportedly has invested \$1.65 Billion in RCN and the company has raised over \$5 Billion more, to roll out its network and acquire new firms."²⁶ [*Wall Street Journal*, 1999]

"Last year, trade reports stated that RCN's systems in Boston and its suburbs are about 50% completed."²⁷ [*Broadcasting & Cable*, 2000]

Curiously, the Bureau relied on these one- and two-year old media reports without referring to any of the more recent adverse media reports from 2000 and 2001, which noted the difficulties

²¹ *Cablevision Order*, 16 FCC Rcd. at 14058 ¶ 7, 14059 ¶ 10.

²² *Cablevision Order*, 16 FCC Rcd. at 14061 ¶ 15.

²³ *Cablevision Order*, 16 FCC Rcd. at 14062 ¶ 17.

²⁴ *Cablevision Order*, 16 FCC Rcd. at 14061 ¶ 15.

²⁵ *Cablevision Order*, 16 FCC Rcd. at 14061 n.37, citing Bruce Mohl, City Hopes Cable Pact Means Rate War, *Boston Globe*, July 28, 1999 at 1.

²⁶ *Cablevision Order*, 16 FCC Rcd. at 14061 n.38, citing Kara Swisher, Paul Allen is Investing \$1.65 Billion in Telecommunications Firm RCN Corp., *Wall Street Journal*, October 4, 1999 at A-3.

²⁷ *Cablevision Order*, 16 FCC Rcd. at 14061 n.38, citing John Higgins, RCN's High Wire Act, *Broadcasting & Cable*, May 8, 2000, at 22.

RCN and other telecommunications companies were having in trying to acquire capital to construct new systems. For example:²⁸

“RCN, which is building a network from the ground up in Greater Boston, has been experiencing financial difficulties lately.”²⁹ [*The Boston Globe*, 2000]

“[RCN fires 65 – spokeswoman states,] we’re going to be expanding in the Boston market at a lesser rate of growth than previously.” [*The Boston Herald*, 2001]³⁰

“RCN Corp. (RCNC) announced last month it would spend only about \$775 million next year, 50 percent lower than its original budget.” [*Pittsburgh Post-Gazette*, 2001]³¹

Nor did the Bureau cite the Commission’s 2001 own statement in the *Seventh Report* that RCN was changing its business model “in response to tighter capital market,” nor the similar findings of the City’s performance review noted above.³² Instead, relying on the future construction obligations in the 1999 License Agreement and the outdated 1999 and 2000 press reports, the Bureau concluded that the Commission’s rules permitted the Bureau to declare effective competition at once. That is, the Bureau determined that it was consistent with Commission policy to revoke the City’s rate regulation certification *then* in anticipation of RCN’s promised buildout *later*.³³

The City filed an Application for Review of the Bureau’s *Cablevision Order* on August 20, 2001, alleging that RCN was not “offering” service even in the attenuated sense required under the Commission’s rules because it needed significant additional investment to construct its system. The City also argued that in light of RCN’s changed financial circumstances, it was

²⁸ See *infra* notes 13 and 14.

²⁹ Bruce Mohl, *Cable TV Mergers Delaying Rate Hikes, Big Firms Have Yet To Announce Plans for Coming Year*, *Boston Globe*, Dec. 26, 2000, at C1.

³⁰ Tom Kirchofer, *Media Upstart Fires 65*, *The Boston Herald*, Jan. 23, 2001, at 25.

³¹ Len Boselovic, *AT&T Woes Hurt C-COR Stock’s Reception*, *Pittsburgh Post-Gazette*, Jan. 8, 2001, at B-7.

³² *Seventh Report* at n.441, 16 FCC Rcd. at 6060-61.

³³ *Cablevision Order*, 16 FCC Rcd. at 14061 ¶ 15.

unlikely that competition would emerge in the City in the manner predicted by the Bureau.³⁴

The Commission took no action on the City's application in 2001.

5. 2002: The Commission Affirms the Bureau's Effective Competition Determination.

a. The Commission's *Cablevision Review Order*.

The Commission denied the City's Application for Review on March 13, 2002, concurring with the "Bureau's conclusion that RCN intends to build out its system to serve the entire city of Boston, albeit at a slower pace than it originally intended."³⁵ The Commission concluded that the recent changes in RCN's finances did not constitute evidence that RCN would not eventually build out its system and deliver the benefits of competition to Boston residents.

The Commission dismissed the City's argument that RCN's 2001 failure to meet the License Agreement's buildout requirements should be evidence that RCN was not "offering service" throughout the franchise area as required by the LEC test. The Commission stated:

"[A] cable operator need not prove that a competing LEC is providing service throughout its service area. Instead, if the LEC is franchised, a showing regarding the *coverage and construction obligations in the franchise agreement* normally is sufficient to satisfy the LEC test."³⁶

The Commission justified its reliance on future construction obligations partly on the basis of the alleged "competitive impact" a LEC can have "on a cable operator before the LEC finishes

³⁴ *In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition Application for Review*, Application for Review (filed by City Aug. 20, 2001); *In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition Application for Review*, Opposition to Application for Review (filed by Cablevision Sept. 4, 2001); *In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition Application for Review*, Reply to Opposition to Application for Review (filed by City Sept. 17, 2001).

³⁵ *In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition Application for Review*, Memorandum Opinion and Order, CSR 5048-E, DA 02-70, 17 FCC Rcd 4772, 4776 at ¶ 14 (March 13, 2002) ("*Cablevision Review Order*") (emphasis added).

³⁶ *Cablevision Review Order*, 17 FCC Rcd 4772 at ¶ 9 and n.34, citing *Cable Reform Order*, 14 FCC Rcd. at 5302 (emphasis added).

installing its plant or rolling out service.”³⁷ The Commission also held that “reliance on future buildout promises” is not “inappropriate in the current telecommunications environment,” stating that the Commission’s previous decisions

“...permit an incumbent cable operator to include, in its effective competition pleading evidence concerning its competitor’s *future coverage and construction obligations*,” and the Bureau “correctly relied upon that information in making its determination.”³⁸

C. RCN’s Cable License Agreement Is Replaced With an OVS Agreement.

On April 23, 2002, less than six weeks after the Commission declared effective competition to exist in the City on the basis of RCN’s License Agreement, RCN filed an application with the Commission for certification to provide OVS service in Boston. This filing signaled RCN’s intent to give up its cable franchise and to operate under the OVS rules instead, in order to avoid being bound by the now-impracticable buildout commitments.

RCN had provided the City with advance notice that it would request OVS certification, explaining its reasons for doing so and its plans for continued operation. Once federal OVS certification was granted, RCN would request that the City dissolve the 1999 License Agreement and grant it an OVS license without specific buildout requirements. RCN insisted that it was unable to raise the capital necessary to expand its network anywhere in the Boston market. Hence, RCN would be unable to meet the buildout requirements in its License Agreement.

Reluctant to accept the elimination of RCN’s buildout requirements, the City investigated the possibility of an extension of time for construction. RCN, however, indicated that it could not in good faith agree to a mere extension of the buildout requirements, because RCN could not predict when it would be able to acquire enough capital to expand its system. On the other hand,

³⁷ *Cablevision Review Order*, 17 FCC Rcd 4772 at ¶ 9 and n.35, *citing Cable Reform Order*, 14 FCC Rcd. at 5302 (emphasis added).

³⁸ *Cablevision Review Order*, 17 FCC Rcd 4779 at ¶ 18 and n.54, *citing Cable Reform Order*, 14 FCC Rcd. at 5305.

RCN believed that an OVS agreement without buildout requirements would enable the company to use its operating capital to increase its penetration rate through the wiring of new homes *within* its current footprint, as well as ensure that RCN maintained enough operating capital to continue to meet the other obligations of its License Agreement.³⁹

The Commission approved RCN's request for OVS certification on May 3, 2002.⁴⁰ On September 30, 2002, in an effort to preserve what little competition actually existed within Boston, the City granted RCN's request to dissolve its July 1999 Cable License Agreement with the City and agreed to enter into an OVS license agreement ("OVS Agreement") instead. The OVS Agreement did not establish a schedule to complete construction in the City.⁴¹

RCN has now been operating under the OVS agreement for nine (9) years. During that time it has not expanded its system beyond the areas of the City served at the time of the Commission's March 2002 Order. Where the 1997 License Agreement had required RCN's system to pass a total of 265,110 homes by the end of 2002, RCN's system today passes only a

³⁹ *Lynch Aff.* at paragraph 3.

⁴⁰ This petition can be found at: <http://www.fcc.gov/mb/ovs/rcnbos.doc>.

⁴¹ By separate letter, RCN committed that if and when it is able to acquire the capital necessary to expand its system, at least half of such capital spending in the Boston market will occur within the City of Boston itself. This 50% pledge was the best and only construction pledge RCN could offer the City. However, it does not actually require RCN to expend capital to expand the RCN system within the City.

RCN's new OVS agreement also reflected an additional reduction in the company's obligation to extend service. Under the License Agreement, RCN was required to provide service to all residences without additional charge provided that the line connection costs to each residence was equal to or less than RCN's average line connection cost per home in the City. *1997 License Agreement* at Section 3.2(b). Under the OVS Agreement, however, RCN is not obligated to connect any noncommercial establishments on those streets in which the line connection costs would exceed \$1,000 per household (exclusive of converter and drop costs) unless all subscribers on those streets agree to pay the additional costs. RCN is obliged to make its OVS service available to all commercial establishments, but is entitled to charge commercial establishments for all line connection costs. *2002 OVS Agreement* at Section 3.4.

fraction of that number and has no legal obligations to pass anymore.⁴² Nothing has occurred to alter RCN's statements in a side letter accompanying the OVS Agreement:

The City can reasonably expect that system expansion will take place only in the areas where RCN is currently operational for the foreseeable future. It is simply much too difficult to predict the future of the telecommunications marketplace at this time.⁴³

D. 2010: RCN's Corporate Ownership and Structure Are Changed and OVS in Extended.

On March 24, 2010 Mayor Thomas M. Menino received an application for approval of a transfer of ownership and control of the Boston RCN system to Yankee Cable Acquisition, LLC ("Yankee Cable"), a subsidiary of Boston-based ABRY Partners, VI, L.P. ("ABRY Partners"). The application included descriptions of complex financial arrangements and charts of corporate structures as they exist prior to the transaction, and as they will exist once the proposed transaction was completed. It also included descriptions of both the new Yankee Cable entity and ABRY Partners. The charts and description are reproduced below is Section II, B.

The City of Boston on July 16, 2010 both approved the requested transfer and renewed RCN's OVS agreement on substantially the identical terms as those agreed to in 2002. The renewal will run until July 16, 2020.

Following the close of the merger, ABRY Partners VI, the ultimate corporate parent of RCN-BecoCom, LLC was able to attractive additional investors in the system, as reflected in the chart below, but because their OVS agreement with the City requires such ownership changes be approved, RCN again requested and was granted such transfer authority. Final approval for these additional investors was granted on February 25, 2011.

⁴² 1997 License Agreement at Section 3.2(a).

⁴³ Thomas Steel, RCN Vice President and Regulatory Counsel, Letter to Mayor Thomas Menino, September, 2003 ("RCN OVS Letter").

New Ownership Interest	Percentage of Ownership
Spectrum Equity Investors	19.7%
New York Life Capital Partners	6.6%
HarbourVest Partners	5.4%

II. THE COMMISSION SHOULD IMMEDIATELY RECERTIFY THE CITY OF BOSTON TO REGULATE BASIC SERVICE AND ASSOCIATED EQUIPMENT RATES.

Pursuant to 47 C.F.R. § 76.910, reassuming jurisdiction to regulate basic service and associated equipment rates requires the City to file a petition that (a) states that the City meets the requirements in 47 U.S.C. § 543(a)(3); (b) states that the cable system is not subject to effective competition; and (c) contains a clear showing that the reasons for the earlier revocation no longer obtain.

A. The City Satisfies the Requirements of 47 U.S.C. § 543(a)(3).

The City, by means of the Massachusetts Division of Telecommunications and Cable, has administrative regulations with respect to basic service and associated equipment rates in place that are consistent with the regulations prescribed by the Commission.⁴⁴ The City has authority under state law to petition the Massachusetts Cable Television Division Regulation, (“Division”) 207 CMR Section 6.04 to review regulated basic service and associated equipment rates⁴⁵ and has adequate personnel to administer its proposed rate regulations.⁴⁶ The City’s/ Division’s rate regulation proceedings continue to be governed by procedural laws and regulations which

⁴⁴ See 207 CMR Section 6.01 “Pursuant to M.G.L. c. 166A, § 15 and 47 U.S.C. § 543, federal regulations promulgated by the Federal Communications Commission at Subpart N, “Cable Rate Regulations,” 47 CFR § 76.901 *et seq.*, as amended, are hereby adopted and incorporated by reference in 207 CMR 6.01.” The rules governing the Department are available on line at <http://www.mass.gov/Eoca/docs/dte/catv/documents/207cmr.pdf> .

⁴⁵ Mass. Gen. Laws ch. 166A, § 15.

⁴⁶ *Lynch Affidavit*, Exh. 1 at 6.04.

provide a reasonable opportunity for consideration of the views of interested parties.⁴⁷ Thus, the City satisfies the requirements of 47 U.S.C. § 543(a)(3).

B. The City Is Not Subject to Effective Competition.

Boston is not subject to effective competition. The LEC affiliation and buildout requirements relied on by the Commission in its prior determinations have changed or been rendered by time incorrect. RCN's system now serves only a limited geographic area of the City. According to an RCN commitment, RCN is only obligated to invest 50% of the capital allotment in the Northeast to the City of Boston. With that limitation, it is unreasonable to assume that RCN could ever be expected to build out the Boston system in a reasonable timeframe.⁴⁸

1. A Local Exchange Carrier Does Not Currently Offer Video Programming Services to Boston Subscribers.

The LEC effective competition test can only be satisfied if, among other things, a "local exchange carrier or its affiliate offers video programming services directly to subscribers . . . in the franchise area"⁴⁹ In the City, the video programming provider, RCN BecoCom LLC, is neither itself a local exchange carrier nor is it affiliated with such an entity.

In 2010, the City approved a transfer of ownership and control of the City's cable franchisee.⁵⁰ Through this transaction, the City's franchisee changed from RCN-BecoCom, Inc., to RCN BecoCom LLC. The following charts illustrate the change in corporate structure:

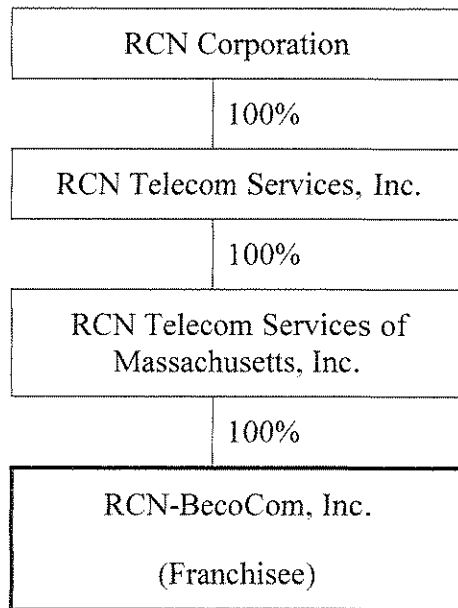
⁴⁷ Mass. Gen. Laws ch. 166A, § 15; 207 CMR Section 6.00 et seq.

⁴⁸ Copies of all documents dealing with the RCN transfers and OVS renewal are available at <http://www.cityofboston.gov/cable/franchises.asp>

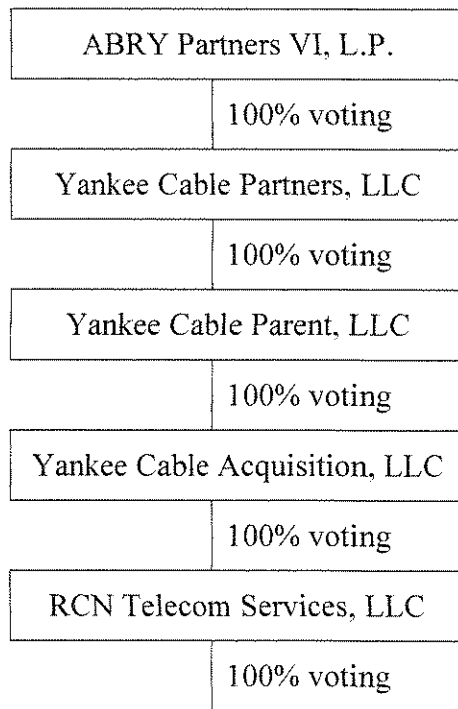
⁴⁹ 47 U.S.C. § 543(l)(1)(D).

⁵⁰ See, generally, <http://www.cityofboston.gov/cable/franchises.asp> (describing recent transfer and attaching Form 394 Transfer Notice).

Pre-Transaction Corporate Structure of Franchisee



Post-Transaction Corporate Structure of Franchisee



RCN BecoCom LLC

(Franchisee)⁵¹

Critically, not one of the entities in the franchisee's *post*-transaction corporate structure is a local exchange carrier. The state of Massachusetts' Department of Telecommunications and Cable maintains a list of "Massachusetts Licensed Telecommunications Operators."⁵² The list includes the City's previous franchisee, but it does not include the City's current franchisee or any of the entities that now hold a controlling interest in the franchisee. Accordingly, contrary to the Bureau's previous finding,⁵³ the central element of the LEC effective competition test is lacking: the entity that provides video programming services in the franchise area, RCN BecoCom LLC, is not a local exchange carrier, and it is not affiliated with such an entity. As summarized in Exhibit B by the City financial consultants, a copy of which is attached hereto as Exhibit 4, the RCN acquisition by ABRY Partners is:

[Pre Reorganization]

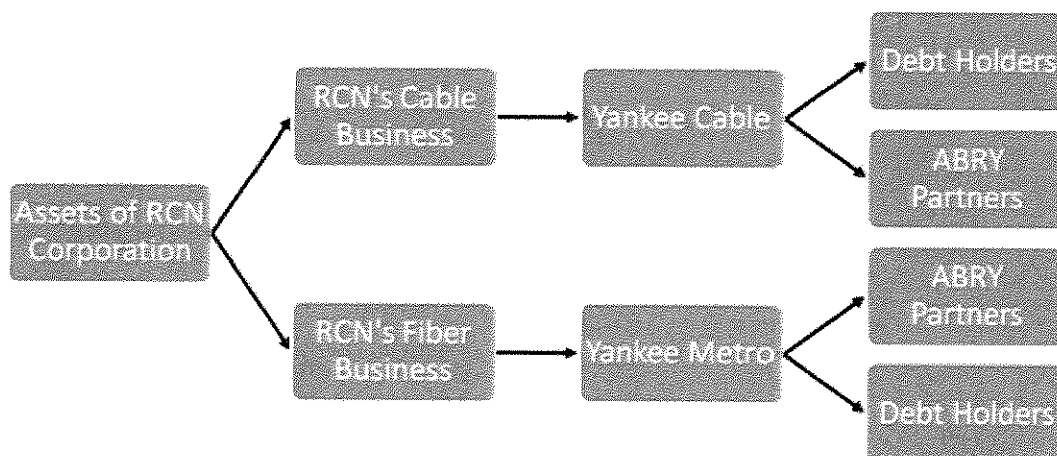
[Reorganization]

[Acquisition]

⁵¹ Please note that while the names of the organizations in many cases are similar, the post reorganizations are new LLC organizations and not the same as the pre-reorganizations.

⁵² See The Official Website of the Office of Consumer Affairs and Business Regulation, <http://db.state.ma.us/dtc/firmTelecomList.asp>

⁵³ *Cablevision Order* at ¶ 4 n.10 (noting SEC filing showing an affiliated corporate entity registered to offer local exchange carrier services and to resell long distance).



2. The 1999 Construction Obligations No Longer Exist.

The Bureau and Commission relied upon the construction buildout requirements in RCN's 1999 License Agreement to determine that RCN was offering service within the City and thus satisfied the LEC test.⁵⁴ However, those construction buildout requirements no longer exist. The Bureau stated that its ruling relied on "the aggressive buildout requirement and liquidated damage provisions of the franchise."⁵⁵ In contrast, RCN's prior and current OVS Agreement does not contain any such buildout requirements, much less liquidated damages.

The Commission's affirmation of the Bureau's decision stated that "if the LEC is franchised, a showing regarding the coverage and construction obligations in the franchise agreement normally is sufficient to satisfy the LEC test."⁵⁶ Even if this argument were sound, the premise is no longer valid. RCN is no longer a franchised cable provider within the City and is no longer obligated to meet any construction obligations within the City.

⁵⁴ *Cablevision Order*, 16 FCC Rcd. at 14061 ¶ 15, 14062 ¶ 17; *Cablevision Review Order*, 17 FCC Rcd. at 4776 ¶ 9, 4779 ¶ 18.

⁵⁵ *Cablevision Order*, 16 FCC Rcd. at 14062 ¶ 17

⁵⁶ *Cablevision Review Order*, 17 FCC Rcd. at 4776 ¶ 9.

Thus, there is no legal basis for the Commission to presume that future system construction will occur. Based on the limited geographic area served by RCN, under the Commission's rules, RCN is not providing effective competition within the City.

3. RCN Does Not Offer Service Throughout the Franchise Area.

Under the LEC test, effective competition occurs only when a local exchange carrier "offers" video programming service in the franchise area. However, the Commission has made clear that service "to a geographically limited market within the franchise area will not satisfy the effective competition test".⁵⁷

We reject the argument advocated by cable interests that any service offering in the franchise area, no matter how minimal, should be sufficient for a finding of effective competition. . . . [S]o lenient a test "could have the unfortunate result of allowing a dominant cable company to raise rates, unabated by regulation or genuine competition, whenever a LEC delivers video signals to just one home in the franchise area." . . . [A] cable operator's rates could be prematurely deregulated in a franchise area, allowing it to subsidize subscribers where it faces competition by charging higher rates to subscribers in the rest of the franchise area. . . . This is not what we believe Congress intended. The thrust of the 1996 Act is Congress' expectation that LECs will be robust competitors of cable operators because of their financial and technical ability and, as Cablevision points out, their ubiquitous presence in the market.⁵⁸

As RCN offers service only to a geographically limited portion of the market – passing only a small percentage of the residences in the City – the presence of RCN in the Boston market does not constitute effective competition, notwithstanding the loss of the LEC affiliate attribution.

⁵⁷ *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, CS Docket No. 96-85, 14 FCC Rcd 5296, 5304 at ¶ 12 (Mar. 29, 1999) ("*Effective Competition Order*").

⁵⁸ *Effective Competition Order*, 14 FCC Rcd 5296, 5302 at ¶ 9 (citations to submitted Comments omitted) (emphasis added). The LEC test does not contain a specific system penetration rate, but there is a presumption that LEC systems will meet or exceed the 50% penetration rate required under the competitive provider effective competition test. *Id.* at ¶ 10.

4. RCN Will Not Be Physically Able to Deliver Service Without Significant Additional Investment.

RCN cannot offer service throughout the City without significant additional investment.⁵⁹

The Commission's rules state that service is deemed offered when the MVPD "is physically able to deliver service to potential subscribers *with the addition of no or minimal additional investment.*"⁶⁰ But that is not the case here. Again, notwithstanding the loss of the LEC affiliate attribution, RCN has stated that it cannot expand its Boston system without additional capital.⁶¹

These remarks mirror the RCN statements reported by the Commission in its *Ninth Annual Report* on video programming services:

Like all BSPs, however, RCN has experienced trouble acquiring financing, and as a result, has scaled back expansion plans and *focused on marketing to existing passed homes.*⁶²

In fact, RCN has been forced sell off systems in other markets to raise cash to reduce its overall debt.⁶³ Thus, the possibility that RCN could even be forced to exit the Boston market cannot be ruled out.

⁵⁹ See *supra* note 17.

⁶⁰ 47 C.F.R. § 76.905(e)(1).

⁶¹ RCN OVS Letter at 1 ("[T]here are real and severe constraints in the current telecommunications marketplace which limit RCN's ability to raise *needed capital to expand its network* not only in the City of Boston but also in its market of municipalities surrounding the City (the Boston Market). . . . [S]ystem expansion will take place only in the areas where RCN is currently operational for the foreseeable future").

⁶² *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, CS Docket No. 02-145, 17 FCC Rcd. 26901, 26948-49 at ¶ 103 (2001) ("*Ninth Annual Report*"); see also *Id.* at 26949 n.356 ("TR Daily, RCN Corp. in Talks with Bank Lenders, Forecasts Reined-In Business Plan, Feb. 8, 2002, at <http://www.tr.com/online/trd/2002/td020802/index.html>; Kathy Bergen, RCN's Cable Future Looks Fuzzy, CHICAGO TRIBUNE, Mar. 15, 2002, at http://www.chicagotribune.com/business/chi-0203150373_mar15.story?coll=chi%2Dbusiness%2Dhed; TR Daily, RCN Amended Bank Lines Tapped Out, But Cash Holdings Still Total \$650M, Mar. 26, 2002, at <http://www.tr.com/online/trd/2002/td032602/index.html>.)

⁶³ RCN Corp., RCN to Receive \$245 Million for Non-Strategic New Jersey Cable Systems [80,000 subscribers] (press release), Aug. 27, 2002; John Curran, RCN to Sell Cable System; Fund Bond Repurchases, T.R. Daily, July 11, 2003.

In light of RCN's admission that it needs additional capital to build out its Boston system, that it lacks the means to acquire additional capital at this point to expand any of its systems, and that it will be focused on marketing to existing homes passed, RCN cannot reasonably be deemed to be offering service as that term is defined by the Commission. Nor can it be presumed that RCN will have the financial ability to reduce its rates and thus provide even minimal competitive pressure on Comcast to do the same.⁶⁴

III. THE REVOCATION OF THE CITY'S JURISDICTION TO REGULATE BASIC SERVICE AND EQUIPMENT RATES HAS HARMED BOSTON SUBSCRIBERS.

That the declaration of effective competition in the City in anticipation of RCN's future system construction has not resulted in lower rates for Boston subscribers was recently confirmed in a study commissioned by the Mayor's Office of Cable, Video and Web Services.⁶⁵ In its April, 2011 report, Front Range Consulting, Inc. ("FRC") reviewed the history of rate increases in the Boston area and concluded:

FRC believes that Comcast, on being freed from the FCC rate regulation process by the FCC's Order finding Boston subject to Effective Competition, has collected from Basic Service customers approximately \$24 Million more than it charged neighboring Basic Service customers over the time period of 2008 through 2011. The Effective Competition determination was made by the FCC because of the existence of RCN as a competitive wireline cable system. (The FCC found that Cablevision\Comcast had demonstrated the presence of effective competition from RCN under 47 C.F.R. § 905(b)(4), the fourth effective competition test (the "LEC test").)

In addition to the City's legal objections to the FCC's finding of effective competition, the existence of RCN has done little to impact Comcast's ability to raise Basic Service rates above normal levels. As reflected in Chart 3 and Table 3, Comcast's Basic Service rates and percentage increases are remarkably lower in other communities in the Boston area that are still rate regulated and lack a wireline competitor.

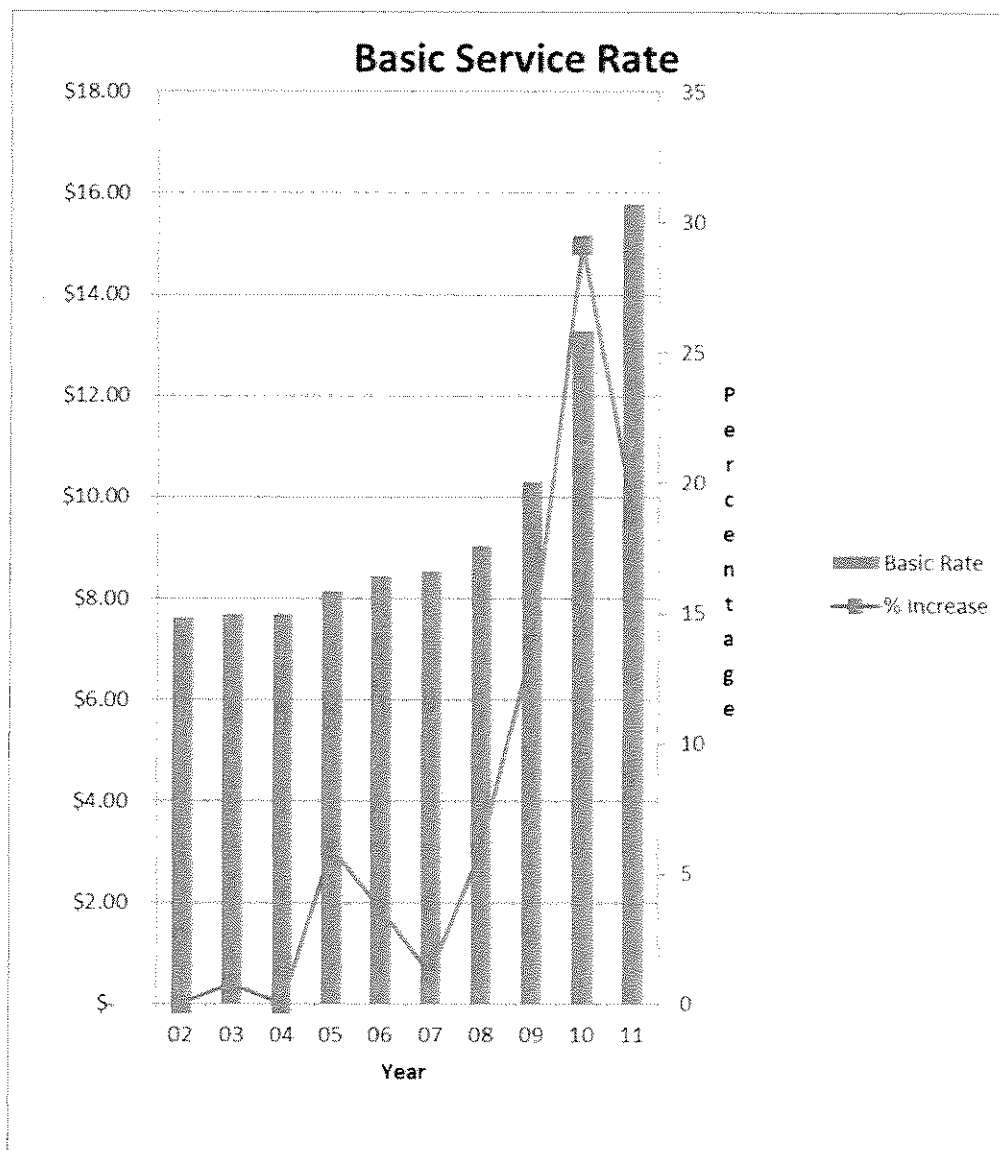
⁶⁴ It should be kept in mind that, since Comcast can charge different rates in different parts of the City while the Commission's competition edict remains in place, RCN's limited presence puts *no* competitive pressure on Comcast to reduce rates anywhere outside the few areas of actual head-to-head competition. Thus, almost all of the City's residents are now exposed to Comcast's market power.

⁶⁵ The FRC Report is attached as Exhibit 3.

According to the FCC Cable Price reports, the presence of a wireline competitor typically has caused rates to be lower in communities where only direct broadcast satellite exists as a competitor. The allure of price competition in Boston does not exist and will allow Comcast to continue its recent historical practice of significantly above normal rate increases for the Basic Service tier.⁶⁶

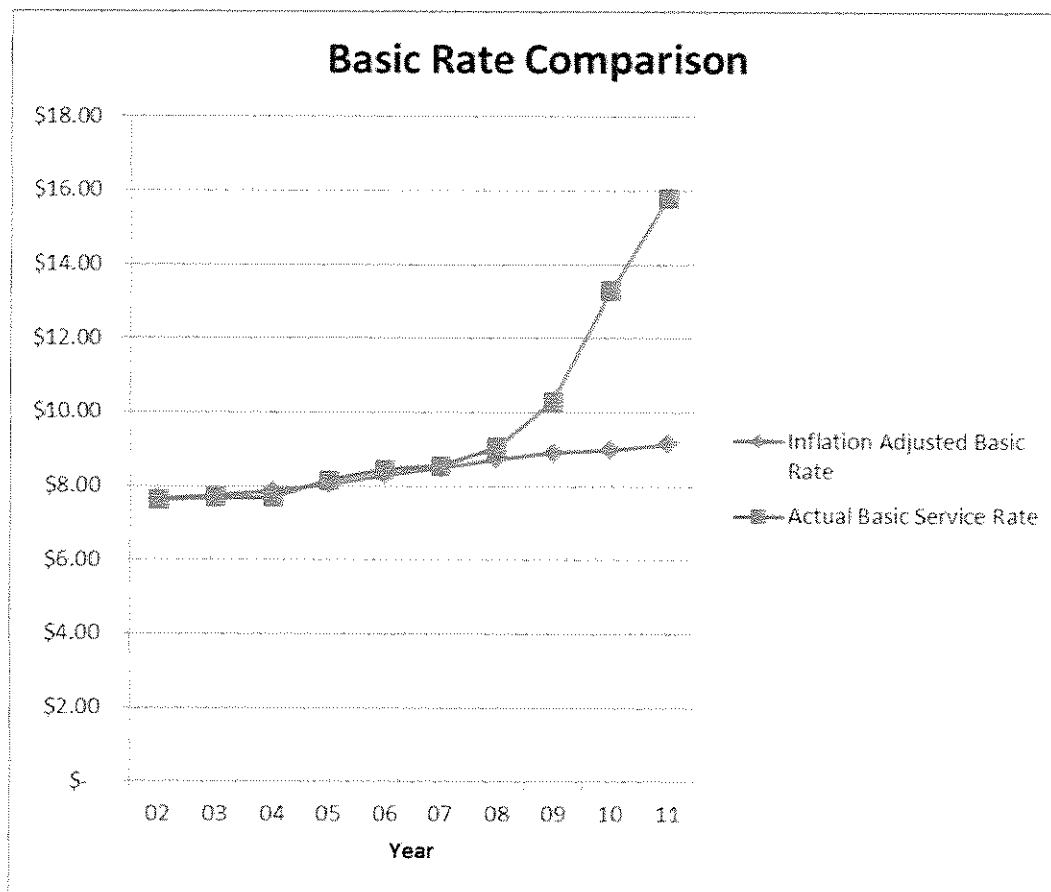
FRC looked at two main analyses: 1) an estimated of the Basic Service rates for Boston during the time since the issuance of the Effective Competition finding and 2) surrounding Boston area rates both subject to and not subject to an Effective Competition finding.

FRC summarized the Boston specific rate increases since 2002 in the following Chart.



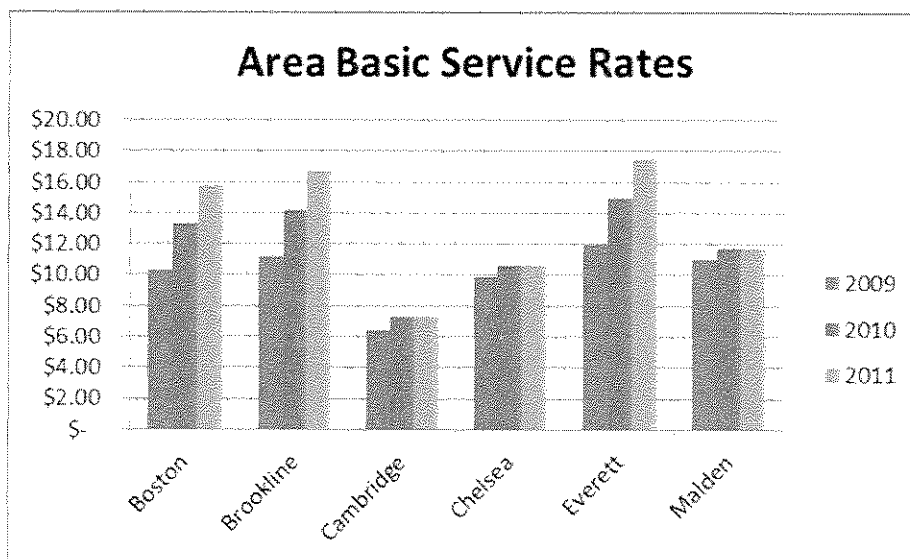
⁶⁶ *Id* at 1.

FRC estimated the regulated rate based on using the FCC 1240 inflation factors and compared the actual rate to the estimates “regulated” rate. FRC’s results are summarized in the following chart.



As can be seen, over the past three years, Comcast has not been constrained by any so-called effective competition by RCN or satellite.

Secondly, FRC investigated surrounding Boston communities which are both regulated and deregulated. Boston, Brookline and Everett are all subject to effective competition determinations. Cambridge, Chelsea and Malden are all still rate regulated. The Basic Service rates were summarized by FRC in the following chart.



As can be seen, the regulated systems are significantly lower than the non-regulated communities and the rate increases are also significantly lower in the rate regulated communities. Boston submits the rate regulation for the Basic Service tier produces lower rates than in systems subject to “effective competition.” In doing the review, FRC compared the channel line-up for Boston vis a vis Cambridge and Chelsea and concluded that the channel line-ups on Basic did not explain the differences in the resulting rate increases.

As the purpose of rate regulation is to provide a substitute when competition does not yet exist, rate regulation is necessary until such time as competition actually develops. The Boston experience demonstrates the difficulty of trying to predict that competition will develop, even where legal obligations to provide competitive service may exist. In the absence of effective competition throughout the City, Boston subscribers require the protection provided by rate regulation.

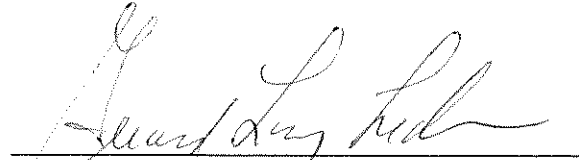
IV. CONCLUSION

For the reasons indicated above, the Bureau should grant the Emergency Petition for Recertification and approve the City’s FCC Form 328, a copy of which is attached hereto as Exhibit 5.

Respectfully submitted,

CITY OF BOSTON, MASSACHUSETTS
By its attorneys,

William F. Sinnott
Corporation Counsel

A handwritten signature in cursive script, appearing to read "Gerard Lavery Lederer", written over a horizontal line.

Gerard Lavery Lederer
Matthew Schettenhelm
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W. #1000
Washington, D.C. 20036-4306
202-785-0600

Counsel for the City of Boston, Massachusetts

May 9, 2011

2806\02\MLF02668.DOC

Certificate of Service

I hereby certify that I have caused to be mailed this 9th day of May, 2011 copies of the foregoing **EMERGENCY RECERTIFICATION PETITION OF THE CITY OF BOSTON TO REGULATE BASIC SUBSCRIBER RATES** and **FCC FORM 328** by first-class mail, postage prepaid, to the following persons:

Comcast Cable Communications, Inc.
Attn: Vice President of Government and Community Relations
426 East 1st Street
South Boston, MA 02127

Comcast Cable Communications, Inc.
Attn: Vice President, Government Affairs
676 Island Pond Road
Manchester, NH 03109

Comcast Cable Communications, Inc.
Attn: Government Affairs
1701 JFK Blvd
Philadelphia, PA 19103

I further certify that I have emailed the **EMERGENCY RECERTIFICATION PETITION OF THE CITY OF BOSTON TO REGULATE BASIC SUBSCRIBER RATES** to the following persons:

Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street S.W.
Washington DC 20554

Mignon Clyburn
Commissioner
Federal Communications Commission
445 12th St. SW
Washington DC 20554

Michael Copps
Commissioner
Federal Communications Commission
445 12th Street S.W.
Washington DC 20554

Meredith Attwell Baker
Commissioner
Federal Communications Commission
445 12th Street S.W.
Washington DC 20554

Robert McDowell
Commissioner
Federal Communications Commission
445 12th Street S.W.
Washington DC 20554

Sherrese Smith
Media Legal Advisor
Office of Chairman Genachowski
Federal Communications Commission
445 12th Street S.W.
Washington DC 20554

Joshua Cinelli
Media Legal Advisor
Office of Commissioner Copps
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445 12th Street S.W.
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Rosemary C. Harold
Media Legal Advisor
Office of Commissioner McDowell
Federal Communications Commission
445 12th Street S.W.
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Dave Grimaldi
Media Legal Advisor
Office Commissioner Clyburn
Federal Communications Commission
445 12th Street S.W.
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Jennifer Tatel
Media Legal Advisor
Office of Commissioner Baker
Federal Communications Commission
445 12th St. SW
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William Lake
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Media Bureau
Federal Communications Commission
445 12th Street S.W.
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Mary Beth Murphy
Policy Division Chief
Media Bureau
Federal Communications Commission
445 12th Street S.W.
Washington DC 20554

John Norton
Deputy Policy Division Chief
Media Bureau
Federal Communications Commission
445 12th Street S.W.
Washington DC 20554

Steve Broeckaert,
Senior Deputy Chief
Media Bureau
Federal Communications Commission
445 12th Street S.W.
Washington DC 20554


Barbara A. Lutes

Washington, D.C.

May 9th, 2011

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)	Docket No. _____
)	
City of Boston, Massachusetts)	Boston, MA
Petition for Recertification)	
)	CUID No. MA0182
)	

DECLARATION OF MICHAEL LYNCH

I, Michael Lynch hereby declare under penalty of perjury that:

1. I am the Director of Boston Mayor Thomas Menino's Office of Cable, Video & Web Services. Mayor Menino, under the laws of the Commonwealth of Massachusetts, is the franchising authority for the City of Boston. In this role, therefore, I oversee all things cable in the City of Boston. I have served in this position since 1996, and have personal knowledge of all facts alleged in both this affidavit and the Emergency Petition for Recertification that the City of Boston is filing with the Commission.

2. In 2002, RCN requested that the City dissolve the company's License Agreement and grant it an OVS license without specific buildout requirements. RCN insisted that it was unable to raise the capital necessary to expand its network anywhere in the Boston market.

3. Because the City was reluctant to eliminate RCN's buildout requirements, the City investigated the possibility of extending the time when RCN was required to complete

construction. RCN, however, indicated that it could not in good faith agree to a mere extension of the buildout requirements, because RCN could not predict when it could acquire enough capital to expand its system. On the other hand, RCN indicated that an OVS agreement without buildout requirements would enable the company to use its operating capital to increase its penetration rate through the wiring of new homes *within* its current footprint, as well as ensure that RCN maintained enough operating capital to continue to meet the other obligations of its License Agreement.

4. Although RCN's 1997 License Agreement had required its system to pass a total of 265,110, a number approaching 100% of the residential units within the City by the end of 2002, the company's system today (2011) passes but a small fraction of that number. Pursuant to the OVS agreement the City recently extended with RCN through the year 2021, the company has no legally enforceable obligation to pass any additional homes.

5. The City, through the Commonwealth of Massachusetts, has administrative regulations with respect to basic service and associated equipment rates that are consistent with the regulations prescribed by the Commission. These regulations are available on line at <http://www.mass.gov/Eoca/docs/dtc/catv/documents/207cmr.pdf> and attached hereto as Exhibit A.

6. Should the Commission grant the underlying Petition for Recertification, I have been directed by Boston Mayor Thomas Menino to pursue a rate regulatory proceeding at the Massachusetts Department of Telecommunications and Cable. In fact, the City has already

commissioned a study by Front Range Consulting to document that Boston basic tier subscribers have been harmed by the lack of either a regulating government entity or the governing influence of a competitive market choice for cable. A copy of the Report is attached as Exhibit 3 to the City's Emergency Petition for Recertification that is being filed with the Commission. The study reveals that in just the last three years, when measured against neighboring rate regulated communities, Boston residents, have paid \$24 million dollars more for the basic service tier.

A handwritten signature in dark ink, appearing to read "Michael Lynch", is positioned above a horizontal line.

Michael Lynch
April 26, 2011

EXHIBIT A

207 CMR 6.00: RATE REGULATION

6.01: Adoption of Federal Cable Rate Regulations

Pursuant to M.G.L. c. 166A, § 15 and 47 U.S.C. § 543, federal regulations promulgated by the Federal Communications Commission at Subpart N, "Cable Rate Regulations," 47 CFR § 76.901 *et seq.*, as amended, are hereby adopted and incorporated by reference in 207 CMR 6.01.

6.02: Commission as Rate Regulator

The Commission is the certified "franchising authority" for regulating basic service tier rates and associated equipment costs in Massachusetts.

6.03: Rate Hearing Procedures

All rate hearings conducted in accordance with M.G.L. c. 166A, § 15 shall be subject to the provisions of M.G.L. c. 30A and 801 CMR 1.00.

6.04: Commission Rate Regulation

The Commission shall, consistent with FCC regulations, regulate the basic service tier and equipment rates:

- (1) At the request of an issuing authority; or
- (2) On its own if the Commission finds such regulation to be in the public interest.

In any case where the Commission acts on its own to regulate rates without the

request of an issuing authority, the Commission shall notify the relevant issuing authority and cable operator prior to commencing regulation.

6.05: Hearing and Notice Requirements

For purposes of fixing and establishing rates pursuant to M.G.L. c. 166A, § 15, the Commission shall conduct public hearings at the Commission's principal office or at such other site as it may designate. Public notice of any hearing shall be made pursuant to 207 CMR 2.02, to insure that there is a reasonable opportunity for consideration of the views of interested parties.

REGULATORY AUTHORITY

207 CMR 6.00: 47 U.S.C. § 543, M.G.L. c. 166A § 15.



In the Matter of: Cablevision of Boston, Inc.; Petition for Determination of Effective Competition

CSR 5048-E; Boston, MA, CUID No. MA0182

RELEASE-NUMBER: DA 01-1731

FEDERAL COMMUNICATIONS COMMISSION

16 FCC Rcd 14056; 2001 FCC LEXIS 5834

July 20, 2001 Released; Adopted July 18, 2001

ACTION:

[**1] MEMORANDUM OPINION AND ORDER

JUDGES: By the Chief, Cable Services Bureau

OPINION BY: FERREE

OPINION:

[*14056] **I. INTRODUCTION**

1. Cablevision of Boston, Inc. ("Cablevision") n1 has filed a petition for determination of effective competition asserting that it is subject to effective competition in Boston, Massachusetts because of the presence of Residential Communications Network of Massachusetts, Incorporated's ("RCN") cable operations in that franchise area. The City of Boston ("Boston") filed comments opposing Cablevision's request to which Cablevision filed a reply. Both Cablevision and Boston filed supplements to update the record.

n1 Cablevision recently transferred its Boston cable franchise to AT&T Broadband. Nevertheless, we refer to Cablevision in this Order because it filed the original petition.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, n2 as that term is defined by Section 76.905 of the Commission's rules. n3 The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. n4 Section [**2] 623(l)(1)(D) of the Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area. n5

n2 47 C.F.R. § 76.906.

n3 47 C.F.R. § 76.905.

n4 See 47 C.F.R. §§ 76.906 & 907.

n5 Communications Act, § 623(1)(1)(D), 47 U.S.C. § 543(1)(1)(D); see also 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 632(l) is often called the "LEC" effective competition test.

[*14057] 3. The Commission has stated that an incumbent cable operator could satisfy the "LEC" effective competition test by showing that the LEC is technically and actually able to provide cable service that substantially overlaps the incumbent operator's service in the [**3] franchise area. n6 The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so, and that no regulatory, technical or other impediments to household service exist. In addition, the incumbent must demonstrate that the LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased, that the LEC has actually begun to provide services, the extent of such services, the ease with which service may be expanded and the expected date for completion of construction in the franchise area. n7

n6 See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

n7 *Id.*

II. THE PLEADINGS

4. Cablevision asserts that it is subject to LEC effective competition in its Boston, Massachusetts franchise area. With regard to the LEC affiliation requirement, Cablevision asserts that RCN n8 is a "fast-growing" multichannel video programming distributor ("MVPD") n9 providing video programming, telephony, and internet services to thousands of subscribers [**4] in Boston. Cablevision adds that RCN is engaged in the provision of local exchange service. n10 Cablevision additionally asserts that RCN is also affiliated with C-TEC n11 and MFS Communications Company, Inc. ("MFS"), n12 two other local exchange [*14058] carriers. Cablevision explains MFS, RCN, and C-TEC were, at one time, all owned by Peter Kiewit Sons, Inc., but that MFS was spun-off from Kiewit in September, 1995. Cablevision, however, states that RCN is still affiliated with MFS, through Kiewit, for purposes of the LEC affiliation requirement. n13

n8 RCN is a wholly-owned subsidiary of RCN Telecom Services, Inc., which presently is a wholly-owned subsidiary of C-TEC Corporation ("C-TEC"). RCN currently provides service in the Boston, New York, Philadelphia/Lehigh Valley, Chicago, San Francisco, and Washington, D.C. metropolitan television markets. See RCN's Annual Report for the Year 2000.

n9 The Commission's rules define an MVPD as "an entity such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, a video dialtone service provider, or a satellite master antenna television service provider that makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 C.F.R. § 76.905(d). While not formally included in the definition, we consider OVS operators to be MVPDs for the purposes of effective competition.

[**5]

n10 Cablevision attaches exhibits to demonstrate that RCN meets the LEC affiliation requirement. *See* C-TEC Corporation SEC Form 10-K, Item 1, Business (filed March 31, 1997), attached as Exhibit 1 to Cablevision's petition; *see also* Peter Kiewit Sons', Inc. SEC Form 10-K, item 1, business--RCN Telecom Services (filed March 28, 1997) ("in Massachusetts, RCN is registered to offer local exchange carrier services and to resell long distance."), attached as Exhibit 2 to Cablevision's petition.

n11 C-TEC is a holding company with wholly and majority-owned subsidiaries engaged in the provision of competitive local exchange services and cable television. C-TEC operates as a local exchange carrier in Pennsylvania, offering service to a 19 county, 5067 square mile service territory in the state. *See* C-TEC 10-K at Exhibit 1.

n12 MFS is a holding company with subsidiaries providing "local and long distance switched service" and "local access" service. MFS is now a wholly-owned subsidiary of WorldCom, Inc. ("Worldcom"). *See* MFS Communications Company, Inc. SEC Form 10-K, item 1, Business (filed May 16, 1997), attached to Cablevision's petition as Exhibit 4.

n13 Cablevision assumes that Kiewit shareholders retained their MFS stock after the spin-off and that the post-merger portion of WorldCom shares held by Kiewit stockholders would be approximately 315 million, or roughly 35% of all WorldCom shares. It adds that Standard and Poor's had reported that certain directors of MFS and Kiewit received approximately 23% of the common shares received in the distribution following the spin-off. *See* Standard and Poor's Corporation, S7P Daily News, "MFS Communications Co., Inc.", October 3, 1995, attached to Cablevision's petition as Exhibit 7.

[**6]

5. With regard to the requirement that the LEC competitor offer video programming service in the unaffiliated cable operator's franchise area, Cablevision asserts that RCN is now offering service by means of a fiber optic network in Boston owned by MFS. Cablevision further asserts that RCN has entered into a joint venture with the Boston Energy Technology Group ("BETG"), a wholly-owned subsidiary of Boston Edison Company ("Boston Edison"), to furnish video programming service in Boston and surrounding communities. Cablevision states that the venture will invest \$ 300 million to upgrade Boston Edison's existing 200-mile ring of fiber optic cable, which will serve as a delivery route for RCN's video and telephony services. n14 Cablevision states that RCN has heavily marketed the availability of its cable service through local media n15 and other means, and news reports indicate that RCN currently furnishes, or has agreements to furnish, video programming service to thousands of customers in multiple dwelling units in the Boston area. n16 Cablevision asserts there are no regulatory, technical, or other impediments to households taking service from RCN.

n14 *See* Exhibit 9 attached to Cablevision's petition.

[**7]

n15 Cablevision states that RCN launched the Boston component of a \$ 10 million advertising campaign aimed at publicizing its service offerings. *See* Cablevision petition at Exhibit 17.

n16 Cablevision includes the two following articles, as Exhibit 12, to support this statement: (1) "RCN Takes Off the Gloves," *CableFax Daily*, July 1, 1997 at 1; and (2) Bruce Mohl, "Cablevision Rival Gets OK from FCC," *Boston Globe*, December 11, 1996 at D1.

6. Cablevision also asserts that RCN offers comparable programming to Boston subscribers. Specifically, Cablevision provides RCN's channel line-up demonstrating that RCN offers 84 channels of video programming, 12 of which are local television broadcast signals. Cablevision offers over 100 channels of video programming in Boston.

7. In opposition, the City of Boston argues that "effective competition" is a premature description of the Boston video market. The City states that only two of the fourteen neighborhoods comprising the franchise area may obtain competing video service from RCN. It adds that it will take between three to five years for RCN to build its system throughout the City. A determination of effective competition, [**8] the City argues, would also remove the "level-playing field" of uniform rates for most subscribers in Boston.

8. In reply, Cablevision argues that the City does not dispute any of the salient facts necessary to grant the relief requested. The operator asserts that the plain language and legislative history of the 1996 Act dictate that cable rates should be deregulated whenever a LEC affiliate offers comparable multichannel [*14059] video programming service in the incumbent's franchise area. Congress could have specified, but did not, a "homes passed" criterion for LEC-affiliated competitors in connection with cable rate deregulation; moreover, Congress did not require that actual penetration reach a specified level although it certainly could have done so. Cablevision also states, contrary to the City's assertion, that RCN-BETG is currently providing video programming service within six of the fourteen neighborhoods in the City of Boston. n17

n17 See Declaration of Kathleen Mayo, Regional Vice President for Cablevision of Boston, attached to Cablevision's Reply.

9. In its supplement, Cablevision states that RCN has obtained a 15 year cable franchise from the City of Boston [**9] on July 27, 1999. n18 According to the operator, RCN's franchise requires it to build a \$ 250 million network capable of serving over 265,110 homes in Boston by the end of 2002 (approximately 90% of all Boston households) and complete its city-wide system within six years. n19 Cablevision states that RCN's failure to meet these requirements would subject the company to substantial liquidated damages of up to \$ 400 per day. n20 In addition, the franchise requires RCN to pay 5% of its gross revenues to the city, build and manage a private data network linking all city buildings, and provide free of charge one connection to the cable television system and the basic service to all public institutions in the City. n21 Cablevision adds that RCN now provides more than 100 channels of programming comparable to that it offers in Boston.

n18 Cablevision Supplement at 1.

n19 *Id.* at 2.

n20 *Id.*

n21 See RCN's franchise agreement with the City of Boston at Sections 8.1, 6.7, and 7.2, respectively (attached as an exhibit to Cablevision's Supplement).

10. Boston replies by stating that RCN's activities in the city do not constitute effective competition under the Commission's [**10] rules and guidelines. According to Boston, as of December 31, 1998, RCN had a total of 2,500 cable subscribers in the City whereas Cablevision had 150,000. n22 Boston also states that there is no evidence offered by Cablevision of widespread construction by RCN in Boston. It asserts that it has only wired assorted MDUs in the city and is beginning construction in three or four of the city's 22 residential wards. n23

n22 City of Boston Supplement of August 26, 1999.

n23 *Id.*

11. Cablevision counters Boston's factual assertions. According to Cablevision, RCN itself has at least 5000 cable subscribers in Boston. n24 Cablevision also states that RCN's cable service is available in at least 12 Boston neighborhoods. n25 Cablevision adds that RCN has commenced construction in four other [*14060] communities

within Boston. n26 Cablevision asserts that RCN does not appear to be providing service or engaging in construction in only the three remaining neighborhoods within the city--East Boston, Mattapan, and Roslindale. n27 Cablevision asserts that the likelihood of impending competition throughout all of Cablevision's Boston franchise area is established as RCN is going forward [**11] in serving all of Boston under a 15 year franchise that will provide competition to 90% of the franchise area by the end of 2002. n28

n24 See Cablevision Supplement of September 9, 1999 citing *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, Comments of RCN Corp. (Aug. 6, 1999) at 5.

n25 These neighborhoods include: (1) Charlestown; (2) North End; (3) South Boston; (4) South End; (5) Jamaica Plain; (6) Roxbury; (7) Back Bay; (8) Beacon Hill; (9) Fenway; (10) Financial District; (11) Allston; and (12) Brighton. *See id.*

n26 These are: (1) North Dorchester; (2) South Dorchester; (3) Hyde Park; and (4) West Roxbury. *See id.*

n27 *Id.*

n28 *Id.*

III. ANALYSIS

12. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition as defined in the Communications Act. n29 The cable operator bears the burden of rebutting the presumption that such effective competition does not exist and so must provide evidence sufficient to demonstrate that effective competition, as defined by Section 76.905 of the Commission's [**12] rules, is present in the franchise area. n30 Cablevision has met this burden.

n29 47 C.F.R. § 76.906.

n30 47 C.F.R. § 76.911(b)(1).

13. With regard to the first part of the LEC effective competition test, which requires that the alleged competitive service be provided by a LEC or its affiliate (or any multi-channel video programming distributor ("MVPD") using the facilities of such LEC or its affiliate), we find that Cablevision has provided sufficient evidence, through SEC documents and other materials, demonstrating that RCN is a LEC n31 as defined by the Communications Act, n32 and RCN fits the Commission's definition of MVPD. n33 Neither Cablevision nor AT&T Broadband are affiliated with RCN or any of RCN's partners.

n31 David McCourt, CEO of RCN, has stated that RCN is a "phone company that offers cable service." *See* Tony Munroe, "Firm Offering One-Stop Shopping for Cable, Phone," *Boston Herald*, August 14, 1996 at p. 24.

n32 The Communications Act defines the term "local exchange carrier" as:

any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under Section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

Communications Act § 3(26), 47 U.S.C. § 153(26).

[**13]

n33 See *supra* n. 9 (definition of MVPD).

14. We also find that Cablevision has submitted sufficient evidence to show that the programming of RCN is comparable to the programming provided by Cablevision. The channel information for RCN submitted by Cablevision establishes that RCN offers more than 100 channels of programming, [*14061] including 12 local broadcast channels. n34 This satisfies the programming comparability criterion.

n34 We note that RCN's bundled products run from a \$ 65 package that includes a cable modem, phone service with four features and unlimited regional calling time, to a \$ 160 package with analog and digital cable, two set top boxes, multiplexed HBO, Cinemax, Starz and Encore premium channels, two phone lines with 16 features and a cable modem. See Joe Estrella, RCN Tests Home Fiber, Awaits Financial Model, *Multichannel News*, June 18, 2001.

15. In addition, we find that based on the information before us, RCN is offering service in Cablevision's franchise area sufficient to demonstrate the presence of effective competition. RCN, once operating as an open video system, has obtained a 15 year traditional cable franchise with the City [**14] of Boston. n35 This long term franchise requires RCN to serve approximately 90% of Boston within 3 1/2 years of signing the franchise agreement, and complete its buildout to every Boston neighborhood six years after signing the franchise agreement. n36 In partnership with BETG, RCN will invest millions of dollars in infrastructure development to provide video, as well as voice and data service, to residents of Boston and surrounding communities. n37 We find that RCN's sizeable investment in physical plant, its franchise agreement with the City, its recruitment of thousands of subscribers in the franchise area, n38 and its financial backing n39 are indicia that RCN is now offering, and will continue to offer, service in the City of Boston.

n35 RCN has signed a contract with the Boston Housing Authority ("BHA") to provide BHA residents bundled telecommunications services. The contract agreement gives RCN access to all 14,000 units in BHA's 64 developments throughout Boston. The properties should all be connected to RCN's network by 2004. RCN is also providing communication services to offices and youth centers in the BHA developments. See "RCN to provide Boston Housing Authority residents with bundled communications services," *RCN Press Release*, March 26, 2001.

[**15]

n36 RCN has begun offering its bundled services to residents of West Roxbury and Roslindale, Massachusetts, two communities in or around Boston. These communities join over a dozen other Massachusetts communities that receive RCN services in the state, including, Arlington, Brookline, Burlington, Dedham, Framingham, Lexington, Needham, Newton, Somerville, Wakefield, Waltham, and Watertown. See "RCN launches Resilink bundled phone, cable and high speed internet services to residents of West Roxbury and Roslindale," *RCN Press Release*, April 17, 2001.

n37 RCN plans to build a \$ 250 million network capable of serving all residents of the city by the end of 2002. See Bruce Mohl, City Hopes Cable Pact Means Rate War, *Boston Globe*, July 28, 1999 at 1.

n38 Last year, trade reports stated that RCN's systems in Boston and its suburbs are about 50% completed. See John Higgins, RCN's High Wire Act, *Broadcasting & Cable*, May 8, 2000, at 22.

n39 Paul Allen reportedly has invested \$ 1.65 Billion in RCN and the company has raised over \$ 5 Billion more, to roll out its network and acquire new firms. See Kara Swisher, Paul Allen is Investing \$ 1.65 Billion in Telecommunications Firm RCN Corp., *Wall Street Journal*, October 4, 1999 at A-3.

[**16]

16. We note that RCN's extensive marketing efforts and the wide press coverage of RCN's construction activity in the local media ensure that potential subscribers are reasonably aware of the availability of RCN's service. Generally, subscribers in wired areas are able to receive RCN's cable service for only a minimal additional investment and without encountering regulatory or technical obstacles. Consistent with Congressional intent in adopting Section 623(l)(1)(D) of the Communications Act, under the circumstances we find "effective competition" to be present.

[*14062] 17. Insofar as the City of Boston's belief that a finding of effective competition would be "premature," we disagree. As discussed above, Cablevision has provided evidence sufficient to satisfy all parts of the LEC effective competition test. In particular, we note the aggressive buildout requirement and liquidated damage provisions of the franchise indicating that our finding is not premature. n40 We also note that the Mayor of Boston, Thomas Menino, has recognized RCN as a viable competitor to Cablevision when RCN's franchise agreement was signed: "Today, Boston residents, as customers, will reap the benefits [**17] of the real choice that comes from deregulation of the cable industry. . . . We have a new company that gives subscribers the right to choose based on product, costs, and consumer service." n41 As Cablevision has submitted sufficient evidence demonstrating that its cable system serving Boston, Massachusetts is subject to LEC effective competition from RCN, its petition is granted, and the certification of the City of Boston is revoked.

n40 See *Time Warner-St. Petersburg*, 12 FCC Rcd 20964 (1997); *Time Warner-Pinellas County*, 12 FCC 3143 (1997); and *Time Warner-Clearwater*, 11 FCC Rcd 20909 (1996) (all finding LEC effective competition when only a portion of the franchise area was built out by the competitor at the time when the Cable Services Bureau rendered its decisions.)

n41 See RCN's press release, July 27, 1999.

IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the Petition for Determination of Effective Competition filed by Cablevision of Boston, Inc. challenging the certification of the City of Boston, in Boston, Massachusetts **IS GRANTED**.

19. **IT IS FURTHER** [**18] **ORDERED** that the certification of the City of Boston, Massachusetts to regulate the basic cable rates of Cablevision in Boston, Massachusetts **IS REVOKED**.

20. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended. n42

n42 47 C.F.R. § 0.321.

W. Kenneth Ferree

Chief, Cable Services Bureau

Legal Topics:

For related research and practice materials, see the following legal topics:

Communications LawBroadcastingCable & Video CompetitionCommunications LawTelephone ServicesLocal
Exchange CarriersDuties of Incumbent Carriers & ResellersCommunications LawVideo TechnologiesMultipoint
Distribution Service



In the Matter of: Cablevision of Boston, Inc.; Petition for Determination of Effective Competition; Application for Review

CSR 5048-E; CUID No. MA0182

RELEASE-NUMBER: FCC 02-70

FEDERAL COMMUNICATIONS COMMISSION

17 FCC Rcd 4772; 2002 FCC LEXIS 1304

March 13, 2002 Released; Adopted March 7, 2002

ACTION:

[**1] MEMORANDUM OPINION AND ORDER

JUDGES: By the Commission

OPINION:

[*4772] **I. INTRODUCTION**

1. Before the Commission is an Application filed by the City of Boston ("City" or "Boston") n1 seeking review of a Memorandum Opinion and Order ("*Order*") adopted by the Cable Services Bureau ("Bureau"), n2 granting Cablevision's Petition seeking a determination that it is subject to local exchange carrier ("LEC") effective competition in the Boston franchise area. AT&T Broadband ("AT&T"), to which Cablevision had transferred its Boston cable franchise, filed an Opposition to Boston's Application to which the City filed a Reply. n3 As discussed below, the Application for Review is denied.

n1 The City of Boston concurrently filed a Petition to Stay the Determination of Effective Competition with its Application for Review. Because we address the merits of the Application in this *Order*, we need not address the arguments raised in the Petition for Stay.

n2 *Cablevision of Boston, Inc.*, 16 FCC Rcd 14056 (CSB July 20, 2001).

n3 The Commonwealth of Massachusetts' Department of Telecommunications & Energy ("DTE") supports the City's request for review. DTE states that it is interested in the final determination of this matter because "the decision will impact the outcome of matters pending before our cable division." See Boston Reply at Exhibit A.

[**2]

II. BACKGROUND

2. Section 623(a)(4) of the Communications Act of 1934, as amended, ("Act") allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition. n4 In the absence of a demonstration to the contrary, cable systems [*4773] are presumed not to be subject to effective

competition as defined by the Act. n5 Cable operators bear the burden of rebutting that presumption and so must provide evidence sufficient to demonstrate that effective competition is present in the franchise area. n6 Section 623(1)(1)(D) of the Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC n7 or its affiliate offers comparable video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area. n8 The Conference Report to the Telecommunications Act of 1996 ("1996 Act") provides that "for purposes of the [LEC test], 'offer' has the same meaning given that term in the Commission's rules as in effect on the date of enactment of [the 1996 Act]." n9 In order to establish that the competing [**3] LEC service is "offered" in its franchise area, the incumbent operator must show the LEC competitor is physically able to deliver service to potential subscribers, with the addition of no or only minimal investment, in order for a subscriber to receive service; that no regulatory, technical or other impediments to household service exist; and that the LEC is marketing its service so that potential customers are reasonably aware that the LEC's services may be purchased. n10

n4 47 U.S.C. § 543(a)(4).

n5 47 U.S.C. § 543(1); 47 C.F.R. § 76.906.

n6 47 C.F.R. § 76.905; see also 47 C.F.R. §§ 76.906 & 76.907.

n7 The Communications Act defines the term "local exchange carrier" as:

any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a Commercial mobile service under Section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

47 U.S.C. § 153(26).

n8 47 U.S.C. § 543(1)(1)(D); see also 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 623(1) is commonly referred to as the "LEC" test.

[**4]

n9 H.R. Rep. No. 458, 104th Cong., 2d Sess. 170 (1996) ("Conference Report"); See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

n10 47 C.F.R. § 76.905(e); *Cable Reform Order*, 14 FCC Rcd at 5305.

3. In its *Order*, the Bureau found that Cablevision had met its burden and that each prong of the LEC effective competition test had been met. First, the Bureau found that Cablevision provided sufficient evidence to demonstrate that RCN is a LEC and that RCN fits the Commission's definition of a multichannel video programming distributor ("MVPD"). n11 Second, the Bureau found that Cablevision submitted sufficient evidence that the programming of RCN is comparable to the programming provided by Cablevision. n12 Third, the Bureau found that RCN is offering service in Cablevision's franchise area [**4774] sufficient to demonstrate the presence of effective competition. n13 The Bureau stated that RCN, formerly operating as an open video system operator, had obtained a 15 year cable franchise with the City of Boston. The Bureau likewise [**5] recognized that RCN is contractually committed to serve approximately 90% of Boston within 3 1/2 years of signing the franchise agreement, and to complete its buildout within six years. Finally, based on Cablevision's submission, the Bureau found that RCN's marketing efforts and the press coverage of RCN's construction activity in the local media ensured that potential subscribers were reasonably well

aware of RCN's service. n14 Relying upon the evidence produced by Cablevision, the Bureau rejected the City's argument that grant of the operator's Petition was premature. n15

n11 *Order* P13.

n12 *Id.* P14.

n13 *Id.* P15.

n14 *Id.* P16.

n15 *Id.* P17.

III. DISCUSSION

4. The City argues first that Congress intended the LEC effective competition test to apply only to established local exchange carriers. n16 It states that a LEC, with operational facilities in place, could enter into the multichannel video distribution marketplace in a more rapid manner than an overbuilder, which would need to construct a completely new system. The City asserts that the legislative history of the 1996 Act indicates that Congress intended for the LEC test to apply to regional [**6] bell operating companies ("RBOCs"), not overbuilders with "immature systems." n17 AT&T, on the other hand, asserts that the statutory language in Section 623(l)(1)(D) does not distinguish between established LECs and other LECs; thus, under the plain language of the statute, MVPD competition provided by a LEC is all that is required to satisfy the LEC test. n18

n16 Boston Application at 6.

n17 *Id.* at 8, *citing* statements of Sen. Larry Pressler in 141 Cong. Rec. S7894 (daily ed. June 7, 1995); 141 Cong. Rec. S8243; 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996); 142 Cong. Rec. S688, S689, S693, S699, S703, S710 (daily ed. Feb. 1, 1996) ("telephone companies pose a very highly credible competitive threat because of their specific identities," "their financial strength," and their "staying power.").

n18 AT&T Opposition at 11. AT&T notes that other provisions of the 1996 Act that were enacted simultaneously with the LEC test do make an express distinction between "established" LECs, such as the RBOCs and GTE, and competitive LECs ("CLECs") (*citing* 47 U.S.C. § 251(b)-(c)).

5. The City's argument that the LEC test is limited to [**7] RBOC video competition is contrary to the conclusions we already have reached in this regard. The City does not argue below or in the instant proceeding that RCN is not a LEC. Rather, the City argues that RCN is not the type of LEC that Congress envisioned in enacting the LEC test. Notwithstanding the disparate legislative statements noted by the City, the clear language of Section 623(l)(1)(D) indicates that the LEC test applies to all local exchange carriers without limitation. n19 We note that, in enacting the LEC test provision, Congress used [**4775] the term "local exchange carrier" which is defined as "...any person that is engaged in the provision of telephone exchange service or access." n20 In using this term in the LEC test, Congress expressly avoided using the more limited term, "incumbent local exchange carrier," which would have excluded CLECs, such as RCN, from being considered under the LEC test. n21 Consequently, we have applied the LEC test to all local exchange carriers that offer multichannel video programming, regardless of their size or class. n22

n19 47 U.S.C. § 543(l)(1)(D).

n20 47 U.S.C. § 153(26).

[**8]

n21 47 U.S.C. § 251(h)(1).

n22 See, e.g., *Time Warner Entertainment Co.*, 11 FCC Rcd 17298 (CSB 1996) (Ameritech New Media as LEC video competitor); *Paragon Communications d/b/a Time Warner Communications*, 12 FCC Rcd 20464 (CSB 1997) (GTE as LEC video competitor); *MediaOne of Massachusetts*, 14 FCC Rcd 13855 (CSB 1999) (RCN as LEC competitor); *MediaOne*, 15 FCC Rcd 13287 (CSB 2000) (BellSouth as LEC video competitor); and *Time Warner Entertainment Co.*, 15 FCC Rcd 8152 (CSB 2000) (TSC Television as LEC video competitor).

6. The City next asserts that the Bureau misinterpreted our rules relating to whether a LEC offers service in a franchise area for purposes of the LEC test. n23 It states that RCN's service is not ubiquitous in Boston because it is only available in four out of sixteen Boston neighborhoods. The City further asserts that RCN is not in a position to offer service immediately throughout the franchise area because substantial additional investment is necessary to build out its [*9] physical plant. The City claims that RCN's need to construct a \$ 250 million system, and to make its operation profitable, poses significant technical and financial impediments to a Boston household wishing to subscribe to RCN's video services. n24

n23 Boston Application at 10.

n24 *Id.*

7. The City states that its franchise agreement with RCN anticipated that RCN would pass approximately 90% of all Boston households by the end of 2002. n25 The City explains that the build-out schedule was set, however, prior to the last two years' economic downturn in the telecommunications industry. The City asserts that as capital markets for telecommunications investments contracted, RCN began scaling back its deployment plans. By March 2001, according to the City, RCN had activated cable plant passing only about 35,000 homes, less than half of the 72,444 homes that should have been activated by the end of the previous year and less than 13% of the 265,110 homes in Boston. n26 The City contends that the Commission should take these changed circumstances into account in its review process. n27

n25 *Id.* at 3.

n26 *Id.*

n27 AT&T argues that the City's Application is procedurally defective because the City, in violation of the rules, presents new facts and arguments that were not presented to the Bureau for consideration. In light of the Stay requested by the City, it is more efficient for the Commission to consider the issues presented, rather than the Bureau. Accordingly, we will consider the new information submitted by the City.

[**10]

[*4776] 8. AT&T responds that the City's contention that RCN's network must be fully constructed "throughout" the franchise area before effective competition may be found is incorrect. AT&T states that the definition of "offer" in the Commission's rules requires only that the MVPD is physically able to deliver service to potential subscribers, with no, or only minimal, additional investment by the distributor, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the MVPD. n28 AT&T argues that the plain language of the definition requires only that service be offered to potential subscribers in the franchise area, not to all subscribers throughout the franchise area. AT&T also maintains that where the LEC has not completed its build-out or rollout, the cable operator need only establish that the LEC "intends to do so within a reasonable period of time." n29 AT&T states that the Commission ruled that "if the LEC is franchised, a showing of the coverage and construction obligations in the franchise should be sufficient [to demonstrate effective competition]." n30 AT&T argues that Cablevision satisfied this

standard in its original Petition. [**11]

n28 AT&T Opposition at 12.

n29 *Id.* at 8.

n30 *Id.* at 9, *citing Cable Reform Order, 14 FCC Rcd. at 5305.*

9. We disagree with the City on this issue. We have said that there is an "expectation that the LEC presence [will] be ubiquitous." n31 We therefore require that ". . .to support a finding of effective competition under the LEC test, the LEC's service must substantially overlap the incumbent cable operator's service in the franchise area." n32 However, the Commission has expressly addressed and rejected claims that the LEC test requires the adoption of a homes-passed or penetration standard. n33 In order to establish the presence of effective competition, a cable operator need not prove that a competing LEC is providing service throughout its service area. n34 Instead, if the LEC is franchised, a showing regarding the coverage and construction obligations in the franchise agreement normally is sufficient to satisfy the LEC test. Furthermore, because a LEC's presence can have a competitive impact on a cable operator before the LEC finishes installing its plant or rolling out service, we will find the LEC test satisfied:

when [**12] *the likelihood of impending competition throughout a substantial part of the incumbent cable operator's service area is established*, the competitive service is commercially available, and potential subscribers in the franchise area served by the incumbent are reasonably aware that the service is either actually available to them or will be available within a reasonable time. n35

[*4777] We therefore conclude that the Bureau properly applied the offering standard consistent with the LEC test.

n31 *Id.* at 5302.

n32 *Id.* at 5303.

n33 *See Cable Reform Order, 14 FCC Rcd at 5300-06.*

n34 *Id.* at 5305.

n35 *Id.* (emphasis added).

10. The City next argues that the Bureau's finding that RCN is "offering service" throughout Boston constitutes an erroneous finding as to an important and material fact. n36 The City argues that the Bureau's *Order* wrongly focused on promises and expectations of competitive service, per RCN's franchise agreement, rather than relying on current facts. n37 The City asserts that RCN recently stated at a public hearing that [**13] it would not meet the build-out requirements contained in its 1999 franchise agreement. n38

n36 Boston Application at 16.

n37 *Id.* at 16-17.

n38 *See City of Boston Annual Performance Review--RCN BECO LLC: Hearing of March 14, 2001 held at City of Boston Police Headquarters (attached to Boston's Application for Review as Exhibit 1) ("RCN Testimony").*

11. AT&T responds that the Bureau's *Order* is supported by substantial evidence in the record, and the City's

claims concerning RCN's future build-out are contradicted by the City's own Application. AT&T asserts that the conclusions the Bureau reached would hold even if the Commission were to entertain the supposed "new" facts proffered by the City. AT&T states, for example, that RCN asserted in its public hearing testimony that it is "fully funded," it has "enough money to build out in the Boston market first," it is "committed to Boston and anxious to do more," and that "competition in this marketplace is working." n39 AT&T points out that, in contrast to the City's statements that RCN provides service in only four of Boston's 16 neighborhoods, according to Exhibit 2 of the City's own Application, as of March 2001, [**14] RCN also was serving residential subscribers in four additional areas: (1) Boston proper; (2) Charlestown; (3) Roxbury; and (4) South Boston. n40 AT&T asserts that its own independent research of RCN's Boston service area reveals that the overbuilder is providing service in eleven of the City's sixteen neighborhoods. n41 AT&T adds that, according to the latest franchise fee calculation filed by RCN with the Boston Cable Television Division on March 8, 2001, RCN had over 11,000 subscribers in the City. n42 In its Reply, the City asserts that AT&T omits the fact that in seven of the neighborhoods cited, RCN serves only specific MDUs and is not in a position to extend that service to City residents at large. n43

n39 AT&T Opposition at 14, *citing* RCN Testimony at 8, 26, 29, 30, and 39.

n40 *Id.* at 14, *citing* City of Boston's Application for Review at Exhibit 2.

n41 *Id.* at 15 and Declaration of Steve Driscoll, Director of Commercial Development for AT&T Broadband's Northeast Region (according to AT&T, Driscoll's investigation found that RCN also is serving: (1) Back Bay/Beacon Hill; (2) Central; (3) Charlestown; (4) Fenway/Kenmore Square; (5) Roxbury; (6) South Boston; and (7) South End).

[**15]

n42 *Id.* at 16, *citing* Letter from Steve Grossman, Director of Regulatory Affairs, RCN, to Alicia Mathews, Director, Cable Television Division, Massachusetts Department of Telecomm. (Mar. 9, 2001)(Attached as Exhibit 2 to AT&T's Opposition).

n43 Boston Reply at 3.

[*4778] 12. With regard to this dispute, the City has suggested in its Application that it was incumbent on the Bureau to ask the parties to refresh the record. n44 AT&T counters that the City's criticism of the Bureau for failing to solicit a factual update from the parties is misplaced. AT&T asserts that it is the responsibility of the parties, not the Bureau, to keep the record current. n45 The City responds that, given the nationwide conditions of the telecommunications market to which the Bureau was "doubtless well aware," it was arbitrary and capricious to act on stale pleadings. n46

n44 Boston Application at 20.

n45 AT&T Opposition at 16.

n46 Boston Reply at 3.

13. We disagree that the Bureau erred by not requesting that the parties update the record. To the extent new evidence was available that it was believed would impact the decision, the burden was on the parties to introduce that evidence. [**16] n47 The City had every opportunity to update the record, but failed to do so prior to the issuance of the Bureau's decision. n48

n47 *See* 47 C.F.R. § 1.65 (applicant responsible for continuing accuracy and completeness of information furnished in pending application); *see also In re Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period, MO&O*, 8 FCC Rcd 5485 at P39 (1993) ("it is not the Commission's responsibility to make a party's case," it is the parties' "obligation to fully develop the record").

n48 We note that Cablevision had, on its own motion, filed a pleading to update the record in this proceeding in 1999.

14. The City has failed to demonstrate that the new evidence would have required the Bureau to reach a different conclusion in this matter. The statements made by RCN earlier this year do not contradict the fact that the company is offering competitive cable service in the Boston franchise area. To the contrary, RCN's testimony supports the Bureau's conclusion that RCN intends to build out its system to serve the entire city of Boston, albeit at a slower pace [**17] than it originally intended. The franchise fee report presented by AT&T also demonstrates that RCN has over 11,000 subscribers throughout the franchise area. Although certain areas in some of the neighborhoods have competitive cable service before others, this situation does not detract from the fact that RCN is providing service substantially overlapping the service provided by AT&T. As for the City's assertion concerning service to MDUs, there is no indication in the record or elsewhere that RCN will not build out and serve the neighborhoods in which such buildings are located. The new facts presented here, coupled with the evidence provided to the Bureau, fully support the original finding that LEC effective competition is present in the franchise area.

15. The City also argues that the Bureau arbitrarily relied upon information from trade press accounts and RCN press statements, not found in the pleadings, to support its finding of effective competition. n49 AT&T argues that none of the press releases/reports cited by the Bureau were necessary because there was substantial evidence in the record to support the Bureau's findings.

n49 Boston Reply at 18.

16. The City has not [**18] shown that the non-record evidence presented any significant [*4779] information not already reflected in the existing case record. Nevertheless, we agree with the City that effective competition decisions should be based on the facts and information contained in the record. Considering the facts of this matter without considering the non-record information, we find that the evidence of record is sufficient to fully support the Bureau's decision. The facts of record relating to the operations of RCN in Boston, including the facts regarding its franchise, franchise obligations, service, ongoing construction, and subscriber growth, n50 demonstrate that LEC effective competition is present in the franchise area. The City had a full and fair opportunity to comment on this evidence before the Bureau rendered its decision. Thus, the City's allegations do not persuade us that the record needs to be reopened or that any party was denied its right to fairly participate in this matter. Based on the record, including the pleadings and evidence now before us, we have no reason to disagree with the Bureau's finding of effective competition.

n50 *See* Cablevision's Petition for Determination of Effective Competition at Exhibits 1,2, 7, 9, 12, and 17; *see also*, Cablevision's Supplement to its Petition for Determination of Effective Competition, generally, and the RCN franchise agreement with the City of Boston attached as an Exhibit to that Supplement.

[**19]

17. Finally, the City contends that the Commission's reliance on future build-out promises is inappropriate in the current telecommunications environment. n51 It requests that the Commission clarify that when the LEC test is applied to any provider that does not already have a built-out system in place, commitments to build will not be accepted without a demonstration of actual construction and the actual number of homes activated. In particular, the City posits that if a franchise requires construction progress reports, up-to-date editions of these reports should be examined before a decision is reached, and press releases and news stories alone should be insufficient. n52 AT&T argues that the City's

claims are collateral attacks on the Commission's rules and that such criticism is impermissible because "the Commission's application for review process is not intended to revisit issues resolved in its rulemaking proceedings."
n53

n51 Boston Application at 22.

n52 *Id.*

n53 AT&T Opposition at 4, *citing In Re Digital Broadcasting*, 12 FCC Rcd 20764 (1997).

18. We find that the Bureau, in reaching its conclusions, appropriately relied upon [**20] the statements and decisions made by the Commission regarding the application of the LEC effective competition test. As stated above, an incumbent cable operator is permitted to include, in its effective competition pleading, evidence concerning its competitor's future coverage and construction obligations. n54 Cablevision included such information in its pleadings, and the Bureau correctly relied upon that information in making its determination.

n54 *Cable Reform Order* at 5305.

[*4780] IV. ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED**, pursuant to Sections 1, 4(i), 5(c), 405, and 623(l)(1)(D) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 405, 543(l)(1)(D), and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that the Application for Review filed by the City of Boston, Massachusetts, **IS DENIED**.

20. **IT IS FURTHER ORDERED** that the stay filed by the City of Boston is **DISMISSED** as moot.

William F. Caton

Acting Secretary

Legal Topics:

For related research and practice materials, see the following legal topics:

Communications Law Broadcasting Cable & Video Competition Communications Law Cable
Systems Franchises Fees Communications Law Video Technologies Satellite Master Antenna Television

Exhibit 3

Report to the City of Boston Regarding Comcast's Basic Service Cable Rates

Prepared by Front Range Consulting, Inc.
April, 2011

I. Introduction and Summary

This Report on the Comcast Basic Service¹ Cable Rates within the City of Boston was prepared upon request of the Mayor's Cable, Video and Web Service department. Specifically, Front Range Consulting, Inc. ("FRC") was requested to analyze the trends in the Comcast Basic Service Cable Rates from 2002 to the present.

FRC believes that Comcast, on being freed from the FCC rate regulation process by the FCC's Order finding Boston subject to Effective Competition, has collected from Basic Service customers approximately \$24 Million more than it charged neighboring Basic Service customers over the time period of 2008 through 2011. The Effective Competition determination was made by the FCC because of the existence of RCN as a competitive wireline cable system. (The FCC found that Cablevision\Comcast had demonstrated the presence of effective competition from RCN under 47 C.F.R. § 905(b)(4), the fourth effective competition test (the "LEC test").)

In addition to the City's legal objections to the FCC's finding of effective competition, the existence of RCN has done little to impact Comcast's ability to raise Basic Service rates above normal levels. As reflected in Chart 3 and Table 3, Comcast's Basic Service rates and percentage increases are remarkably lower in other communities in the Boston area that are still rate regulated and lack a wireline competitor.

According to the FCC Cable Price reports, the presence of a wireline competitor typically has caused rates to be lower in communities where only direct broadcast satellite exists as a competitor. The allure of price competition in Boston does not exist and will allow Comcast to continue its recent historical practice of significantly above normal rate increases for the Basic Service tier.

II. Recommendations

FRC recommends that the City consider several options to impact and/or control the apparent unfettered ability of Comcast to raise its price for the Basic Service tier. The options include:

- Filing the necessary paperwork with the FCC to re-certify the City's rate regulatory authority;
- Negotiate with Comcast to withdraw this proposed rate increase and enter into a long-term rate settlement with the City; and/or

¹ Basic Service cable is the lowest tier of service that can be purchased by a subscriber and contains all of the over-the-air broadcast channels plus other channels designated by the cable operator. It does not typically contain satellite delivered channels such as CNN, ESPN or pay channels like HBO and Showtime.



- Explore federal legislative solutions to return rate regulatory authority to cities to prevent the abusive rate increases as a result of less than effective competition from other video providers.

III. Historical Perspective of Cable Franchises in Boston

Cable television service began in Boston with the award of the first cable franchise to Cablevision Systems in 1982. Cablevision Systems held the franchise for the City of Boston until January 5, 2001 when the system was transferred to AT&T Broadband. AT&T Broadband was the cable operator until it was acquired by Comcast Cable in December of 2002. Comcast and the City concluded a renewal licensee agreement with the City in October 2010. The City also has an Open Video System ("OVS") agreement with RCN Corporation to serve several small areas of the City as a competitive provider to Comcast.

IV. Summary of Basic Service Rates

Basic Service is the lowest tier of service offered by a cable operator and in the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,² as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules and the Basic Service tier is rate regulated. The Basic Service tier typically contains off-air broadcast stations with public, educational and governmental access stations. The Basic tier also typically contains home shopping channels. The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.³

In the case of Boston's Basic Service rates, the City is not allowed under FCC rules to regulate the Comcast's Basic Service rates based on a filing made by Cablevision System asserting that the Boston system was subject to Effective Competition.⁴

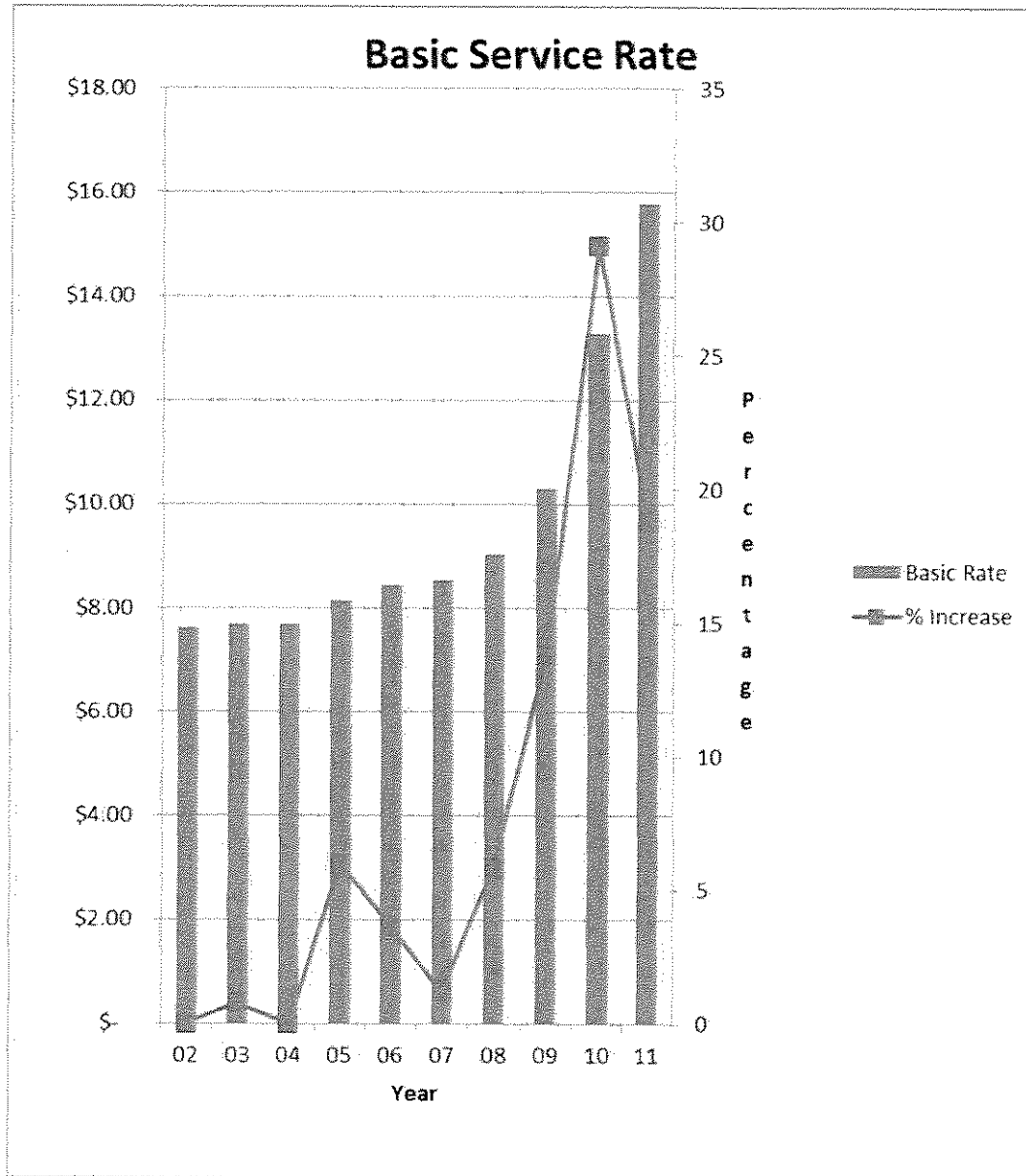
For several years under a rate agreement with AT&T Broadband in December 2001, the Basic Service rates remained relatively low with only modest increases limited to the lesser of 6.5% or the weighted average increases in other AT&T franchises in Massachusetts. The following chart depicts those actual increases in the Basic Service rate from 2002 to 2011.

² 47 C.F.R. § 76.906.

³ See 47 C.F.R. §§ 76.906-.907(b).

⁴ See Section VI below for a complete description.

Chart 1



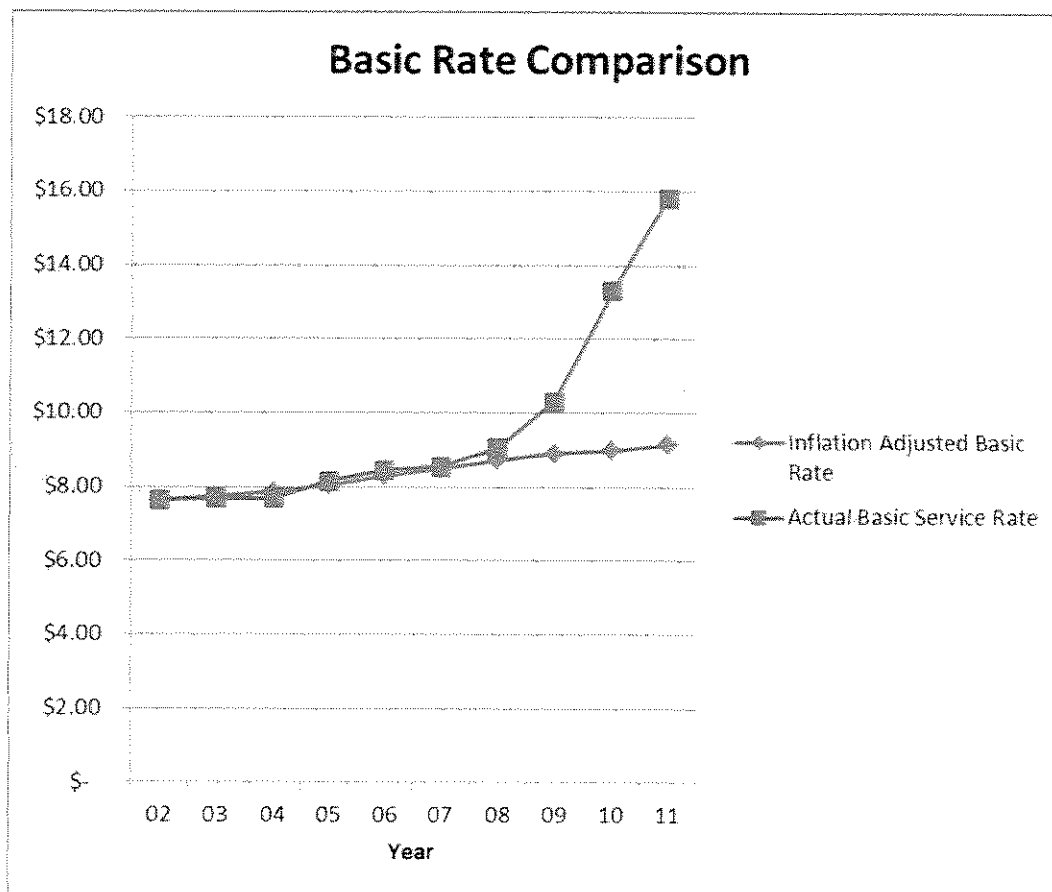
Beginning in 2002, the first year for the rate settlement, the Basic Service rate never increased by more than 6% until 2009 when it increased almost 14%, almost 30% in 2010 and another almost 19% in 2011. Table 1 below shows the actual Basic Service rates and the increases.

Table 1

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Rate	\$7.63	\$7.69	\$7.69	\$8.15	\$8.45	\$8.55	\$9.05	\$10.30	\$13.30	\$15.80
Increase		\$0.06	\$0.00	\$0.46	\$0.30	\$0.10	\$0.50	\$1.25	\$3.00	\$2.50
Percentage		0.8%	0.0%	6.0%	3.7%	1.2%	5.9%	13.8%	29.1%	18.8%

Beginning in 2008, it appears that Comcast has changed its rate strategy with respect to the Basic Service rate. Comcast has significantly increased its Basic Service rate way above the inflation rate not being constrained by the FCC rate regulation scheme because of Effective Competition finding. One way to see what the FCC rate regulation scheme would have done to the Basic Service rates is to apply the FCC inflation rates to the Basic Service rate from 2002. Chart 2 graphs the estimated Basic Service rate compared to the actual Basic Service rate.

Chart 2



As this chart depicts, the actual Basic Service rate tracked closely with the estimated Basic Service rate using the FCC inflation factors until 2009, 2010 and 2011 when Comcast took very large rate increases. Table 2 details the supporting data.

Table 2

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Actual	\$7.63	\$7.69	\$7.69	\$8.15	\$8.45	\$8.55	\$9.05	\$10.30	\$13.30	\$15.80
Estimated	\$7.63	\$7.73	\$7.86	\$8.05	\$8.29	\$8.50	\$8.72	\$8.90	\$8.98	\$9.14
Difference	-	\$-0.04	\$-0.17	\$0.10	\$0.16	\$0.05	\$0.33	\$1.40	\$4.32	\$6.66

Assuming the estimated Basic Service rate approximates what a regulated rate would be, then currently Comcast is charging its Basic Service rate customers a rate that is almost 75% higher than the estimated regulated rate.

V. Summary of Surrounding Area Basic Service Rates

From data supplied by Comcast, Basic Service rates for the surrounding area have been compared to the Basic Service rate in Boston. Chart 3 below depicts the Basic Service rates in the area. Boston, Brookline and Everett have similar Basic Service rates and are substantially higher than the rates for Cambridge, Chelsea and Malden.

Chart 3

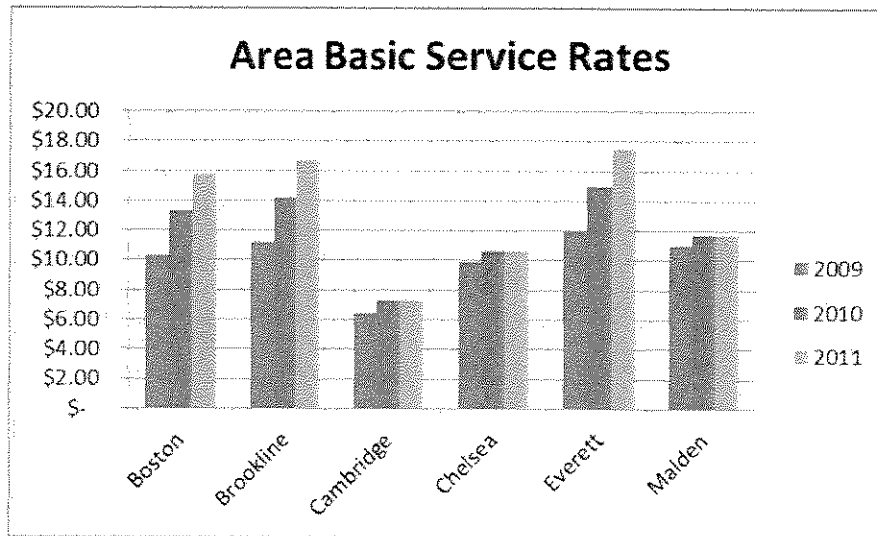


Table 3 depicts the actual rate data analyzed.

Table 3

	Boston	Brookline	Cambridge	Chelsea	Everett	Malden
2009	\$10.30	\$11.20	\$6.45	\$9.95	\$12.00	\$11.05
2010	\$13.30	\$14.20	\$7.30	\$10.63	\$15.00	\$11.72
Increase	29.1%	26.8%	13.2%	6.8%	25.0%	6.1%
2011	\$15.80	\$16.70	\$7.30	\$10.63	\$17.50	\$11.72
Increase	18.8%	17.6%	0.0%	0.0%	16.7%	0.0%

According to information from the Massachusetts Department of Telecommunications and Cable ("DTC"), the communities of Cambridge, Chelsea and Malden are still rate regulated by the DTC under the FCC Form 1240 methodology thereby suggesting that the lower increases and lower Basic Service rates are a result of using primarily an inflation based increase scheme. The other communities including Boston are not regulated under the FCC regulatory scheme and are not constrained by primarily inflationary increases. Comparing the range of the rate regulated rates in the surrounding areas, \$7.30 to \$11.72, the estimated rate for Boston using the FCC inflationary adjustments of \$8.98 (as shown on table 2) would fit with that rate regulated range.

VI. Summary of Surrounding Area Basic Service Channel Line-ups

One thing that can cause differences in rates for a tier of service is the channel line-up for that tier and the attending programming carriage charges (primarily license fees or retransmission consent fees). Table 4 below shows the channel line-ups⁵ for Boston and the two rate regulated communities of Cambridge and Chelsea.

Table 4

Boston			Cambridge		Chelsea	
LN	Ch #	Description	Ch #	Description	Ch #	Description
1	2	WGBH-2 PBS	2	WGBH-2 PBS	2	WGBH-2 PBS
2	3	HSN	3	HSN	8	HSN
3	4	WBZ-4 (CBS)	4	WBZ-4 (CBS)	4	WBZ-4 (CBS)
4	5	WCVB-5 (ABC)	5	WCVB-5 (ABC)	5	WCVB-5 (ABC)
5	6	NE Cable News	6	NE Cable News	6	NE Cable News
6	7	WHDH-7 (NBC)	7	WHDH-7 (NBC)	7	WHDH-7 (NBC)
7	8	TV Guide	8	Access		
8	9	BNN TV	9	CCTN		
9	10	WLVI-56 (CW)	12	WLVI-56 (CW)	12	WLVI-56 (CW)
10	11	NHPTV (PBS)	11	WENH-11 (PBS)	11	WENH-11 (PBS)
11	12	LO				
12	14	WSBK-38 (IND)	14	WSBK-38 (IND)	14	WSBK-38 (IND)
13	18	WZMY-50 (MyTV)	18	WZMY-50 (MyTV)	18	WZMY-50 (MyTV)
14	19	WPX-68 (ION)	15	WPX	9	WPX-68 (ION)
15	22	Muni Channel				
16	23	Community Access				
17	24	Ed. Channel				
18	25	WFXT-25 (FOX)	13	WFXT-25 (FOX)	13	WFXT-25 (FOX)
19	26	Cuencavision				
20	27	WUNI-27 (UNI)	17	WUNI-27 (UNI)	17	WUNI-27 (UNI)
21	44	WGBX-44 (PBS)	16	WGBX-44 (PBS)	10	WGBX-44 (PBS)
22	46	WWDP-SD	71	WWDP	72	WWDP-SD
23	47	QVC			71	QVC
24	50	WUTF-66 (Telefutura)	21	WUTF-66 (Telefutura)	21	WUTF-66 (Telefutura)
25	51	Boston City Council				
26	52	WMFP-62 (IND)	20	WMFP-62 (IND)	20	WMFP-62 (IND)
27	53	WNEU-60 (Telemundo)	19	WNEU-60 (Telemundo)	19	WNEU-60 (Telemundo)
28			10	CCTN	3	Public Access
29			22	CCTN	15	Ed Access
30			58	RTPi (Internet TV)	16	Govmnt Access
31			98	EDACC		
32			99	EDACC		

⁵ The Table identifies only the analog Basic Service line-up and ignores any digital channels part of the Basic Service tier.

Table 4 shows 27 channels for Boston, 25 channels for Cambridge and 22 Channels for Chelsea. Table 5 shows the types of channels by category for each of the three areas.

Table 5

	Boston	Cambridge	Chelsea
Broadcaster / Regional News	20 ⁶	18	17
Home Shopping	2	1	2
PEG	4	6	3
Guide	1	0	0

If you ignore the two low power broadcasters in Boston and Cambridge, all three areas have identical broadcast and regional news programming suggesting there is no basis for any price discrepancies as it is reasonable to assume that all three areas would have the same retransmission fees if any. There are no channels that would appear to have any license fee except for the Guide channel in Boston which should be a very minor license fee if any. Home Shopping channels typically do not have any license fees and will return a percentage of their sales to the cable operator as an enticement for carriage. PEG channels do not charge for carriage as they are required under the franchise agreements. As a result, it does not appear that the channel line-ups for the three areas would be the reason for any price differences between Boston, Cambridge and Chelsea.

VII. 2001 Rate Settlement with AT&T Broadband

Cablevision filed its rate forms (FCC Form 1240) with the DTC on October 2, 2000 prior to the transfer of the system to AT&T Broadband on January 5, 2001. AT&T Broadband assumed responsibility for working with the DTC and the City in getting this rate form approved. Also pending before the DTC was a FCC Form 1235 (system upgrade) filed by Cablevision. During that Form 1240 approval process, a dispute arose regarding the network upgrade fund. As part of a settlement agreement between the City and AT&T Broadband, AT&T Broadband agreed to reduce the current Basic Service from \$9.38 to \$7.63, almost a 20% reduction. Additionally, the settlement contained the following provision:

Between January 1, 2003 and May 11, 2008, the BST [Basic Service Tier] rate will not be increased each calendar year by more than the lesser of i) 6.5% per year, or ii) the weighted average of increases in BST Rates in other AT&T franchises in Massachusetts.

It was this provision that controlled and moderated the Basic Service rates for Boston until 2008. As this provision of the settlement agreement expired in 2008, Comcast was free to increase its

⁶ Includes Cuencavision a low power Boston broadcaster.

rates without constraint as the FCC had granted the Effective Competition petition filed by Cablevision.

VIII. 2001 Effective Competition Order

Cablevision submitted Petition for Special Relief requesting a determination of Effective Competition in the City of Boston's franchise area. The Petition was based on the competitive cable services offered by RCN in the Boston area and RCN's affiliation with a Local Exchange Carrier ("LEC"). The Cable Act provides that an incumbent cable operator can petition the FCC for a determination of effective competition if the competing provider is affiliated with a LEC irrespective of the penetration of the competing provider. The FCC released its Order on July 20, 2001 granting the Petition for Determination of Effective Competition over the objection of the City. In paragraph 17, the FCC stated:

"... As Cablevision has submitted sufficient evidence demonstrating that its cable system serving Boston, Massachusetts is subject to LEC effective competition from RCN, its petition is granted, and the certification of the City of Boston is revoked."

Thirty days after the FCC released its Order, the City filed for an Application for Review requesting that the FCC reconsider the factors relied upon in its July 2001 Order. In part, the City asked the FCC to consider the LEC test for Incumbent LECs ("ILEC") and not apply this test to Competitive LECs ("CLEC"). The City's basis was that a CLEC might not fully build out its system within the franchise area. The FCC rejected this suggestion as well as the other basis submitted by the City and denied the Application for Review in March, 2002. With this final determination of Effective Competition, Comcast is allowed to adjust its rates in an unregulated fashion except for the agreement contained in the rate settlement with AT&T Broadband.⁷

IX. 1992 and 1996 Cable Act Rate Regulation Overview

The era of cable rate regulation began with the passage of the 1992 Cable Act where cable operators were required to unbundle equipment and service rates and to set their equipment rates based on costs and the service rates (Basic Service and Expanded Basic Service⁸) were typically initially set by an FCC derived formula. The Basic Service and Equipment and Installation rates were reviewed and approved by the Local Franchising Authority while the Expanded Basic Service rate was reviewed and approved by the FCC. The FCC also was responsible for

⁷ As an interesting side note, RCN's franchise agreement with the City was canceled in part because RCN could not meet its build out requirements and was converted back to an OVS agreement and eliminated all build out requirements. While RCN has continued to grow slightly, its footprint with the City is fairly small compared to the service area of Comcast limiting the competitive impacts.

⁸ Expanded Basic Service was the next most purchased tier of service and typically included satellite delivered services like ESPN and CNN. Premium movie services like HBO and Showtime and other pay per channel services were not regulated under the Cable Act of 1992.



adjudicating appeals by the cable operators of LFA decisions regarding Basic Service and Equipment and Installation rates.

In the fall of 1993, cable operators were required to submit the FCC Form 393 to the LFA's to determine the Basic Service and Equipment and Installation rates. In general the Form 393 used the cable operator's total revenues for all Basic, Expanded Basic and Equipment and Installation rates and compared those per channel rates to a benchmark rate. If the cable operator's per channel rates was greater than the benchmark rate, the cable operator was required to reduce it's per channel rate by 10% otherwise it was required to reduce its rate to the benchmark rate. The FCC Derived formulas were all done on a per channel basis to account for the fact that there was no uniformity across the country in the number of channels carried on each of the regulated tiers.

In early 1994, the FCC revised the FCC Form 393 rate regulation process and revised the process by requiring cable operators to use a new FCC Form 1200. This Form 1200 mirrored the FCC Form 393 process but used a revised benchmark formula that included variables such as: census income, number of remote controls, and number of additional outlets. The Form 1200 also included another rate reduction of 7% like the 10% included in the Form 393 process essentially reducing cable rates by 17% (before any inflationary increases) as a result of rate regulation of Basic and Expanded Basic rates.

Cable Operators were able to recover inflationary and programming cost increases by submitting FCC Form 1210 as often as every 90 days to the LFA or the FCC. This Form allowed cable operators to keep current on their regulated rates for cost increases. This Form 1210 process became cumbersome for both the cable operators and the LFAs as it was a continuous stream of rate filings before the LFAs and the FCC where rate filings were still being reviewed while new forms were being submitted.

In recognition of this cumbersome problem, the FCC designed a new FCC Form 1240 that allowed cable operators to choose to use the quarterly Form 1210 process or a revised annual process, FCC Form 1240. The Form 1240 process allowed cable operators to estimate its inflationary and programming costs for the next year and true-up those estimates in the next annual filing. The process became more defined for the LFAs under the Form 1240 process as the cable operator had to file the Form 1240 on the same date each year and the LFA had to issue any final order before the next annual filing. Most if not all regulated rates were set using the Form 1240 since it was released in July of 1996.

Congress revised the Cable Act in 1996 to reflect many of the changes that were occurring in the cable TV arena. Two important provisions were changed in 1996: (1) deregulation of the Expanded Basic Service rates in March of 1999 and (2) the revision of the "effective competition" test which deregulated all cable rates in the affected local jurisdiction.



Front Range Consulting, Inc.

X. Summary and Conclusions

FRC, based on the foregoing, believes Comcast has used the FCC Effective Competition determination to increase rates far in excess of the normal inflationary increases allowed under the FCC's rate regulatory scheme. Instead of the presence of a wireline competitor and direct broadcast satellite throttling rate increases, Comcast has been able to increase rates significantly for the lowest level of service, Basic Service. FRC estimates that from 2008 through 2011, Comcast has over-collected approximately \$24 Million from Basic Service customers by being freed from the FCC's rate regulatory scheme. According to the FCC Cable Price reports, the presence of a wireline competitor typically has caused rates to be lower in communities where only direct broadcast satellite exists as a competitor. The allure of price competition in Boston does not exist and will allow Comcast to continue its recent historical practice of significantly above normal rate increases for the Basic Service tier.

Further, other Boston area cable systems controlled by Comcast and which are still rate regulated for the same channel line-up on Basic Service have significantly lower Basic Service rates.

Exhibit 4

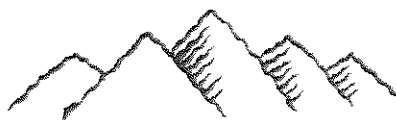
Final Report on the Transfer of RCN's Cable Properties To Yankee Cable and ABRY Partners

**By
Ashpugh & Sculco, CPAs, PLC
and
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May 28, 2010**



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EXECUTIVE SUMMARY

Ashpaugh & Sculco, CPAs PLC and Front Range Consulting, Inc. ("Consultants") have been retained by Miller & Van Eaton, PLLC, on behalf of its clients, the Office of Cable Television of the District of Columbia; the City of Boston, Massachusetts; the Office of the County Executive of Montgomery County, Maryland; and the County Attorney of Arlington County, Virginia (collectively the "Participating LGAs"), to conduct a financial review of the proposed transfer of control of the cable franchises from RCN Corporation to Yankee Cable and ultimately to ABRY Partners VI, L.P.

The transfer of the RCN cable properties is a complex transaction whereby RCN Corporation ("RCN") will undergo several internal reorganizations to separate itself into two entities, one holding the cable properties and one holding the fiber access properties. The cable properties will be acquired by Yankee Cable, which will be funded by new debt holders and equity investment by ABRY Partner's general and limited partners. The transaction will result in RCN effectively being taken private as ABRY Partners will be acquiring all of the outstanding common stock of RCN. According to RCN's Press Release, the offered share price of \$15.00 is a 43% premium for RCN shareholders.

The Consultants have reviewed the underlying details of the transaction, including the historical and projected financial capabilities of RCN, Yankee Cable and ABRY Partners. This review process included requesting two additional data requests from RCN/Yankee Cable and analyzing the projected financial outlook for Yankee Cable. This final Report includes the results of the projection analysis based on the more detailed information from RCN/Yankee Cable provided on May 24, 2010.

Based on the completed review, Yankee Cable has presented projections that support the finding that it is a sufficiently funded entity, that projects that it will have positive cash flows from the cable operations and sufficient financing available to meet its capital needs. These projections are subject to significant potential downside risk, however. The Consultants believe that four potentially negative impacts could occur:

- Overly optimistic projections resulting in increased financing requirements and/or increased cable rates;

- Continuation of a no or limited growth philosophy resulting in the potential loss of market share;

- Short-term investment strategy by ABRY Partners resulting in limited capital expansion of existing footprint; and

- Risk of financial market downturn resulting in the inability to raise either the debt or equity funds.

However, these same concerns apply to RCN as it exists today, except for the short-term investment strategy. Most of the historical and projected data provided and reviewed was created jointly by RCN and Yankee Cable after the merger was announced.

OVERVIEW OF THE PROPOSED TRANSACTION

The ultimate acquisition by ABRY Partners VI, L.P. of RCN Corporation is a very complicated transaction requiring many reorganizations of RCN Corporation in order to create two business units that can be acquired by Yankee Cable and Yankee Metro. Yankee Cable and Yankee Metro will both be equity owned by ABRY Partners. ABRY Partners is an investment management firm that takes equity positions in entities and in turn is expecting to earn equity profits (either in cash earning or increase in value of the entity) to return a profit to its general and limited partners.¹ In response to a request², ABRY's counsel described ABRY Partners as:

“...one of the most experienced and successful private equity investment firms in North America investing solely in media, communications and information businesses. ABRY has completed \$21 billion of leveraged transactions and other private equity investments involving approximately 450 properties. The Firm presently is investing over \$4.1 billion of capital on behalf of its limited partners, which includes Fortune 100 pension funds and foundations. ABRY investments include Atlantic Broadband, Grande Communications, Avalon Cable, WideOpenWest, Citadel Communications, Nexstar Broadcasting Group, Caprock Holdings, Pinnacle Towers, Language Line Services, Q9 Networks and Talent Partners.”

RCN's SEC Form 10K describes the business as:

“RCN is a competitive broadband services provider, delivering all-digital and high-definition video, high-speed internet and premium voice services to Residential and Small and Medium Business (“SMB”) customers under the brand names of RCN and RCN Business Services, respectively. In addition, through our RCN Metro Optical Networks business unit (“RCN Metro”), we deliver fiber-based high-capacity data transport services to large commercial customers, primarily large enterprises and carriers, targeting the metropolitan central business districts in our geographic markets. We construct and operate our own networks, and our primary service areas include: Washington, D.C., Philadelphia, Lehigh Valley (PA), New York City, Boston and Chicago.

Our RCN and RCN Business Services network passes over 1.4 million marketable homes and businesses, and we currently have licenses to provide video services to over 5 million licensed homes and businesses in our footprint. We serve approximately 429,000 residential and SMB customers.

RCN Metro also has numerous points of presence in other key cities from Richmond, Virginia to Portland, Maine. RCN Metro currently enters approximately 1,500 locations through our own diverse fiber facilities, providing connectivity to private networks, as well as telecommunications carrier meet points, and local exchange central offices owned and operated by other carriers. Our RCN Metro fiber routes now total approximately 10,000 route miles, with thousands of additional commercial

¹ Exhibit I to this Report contains the confidential financial statements of ABRY Partners.

² Response to Request No. 8, letter from Danielle Burt to Gerard Lavery Lederer, Esq., dated April 26, 2010.

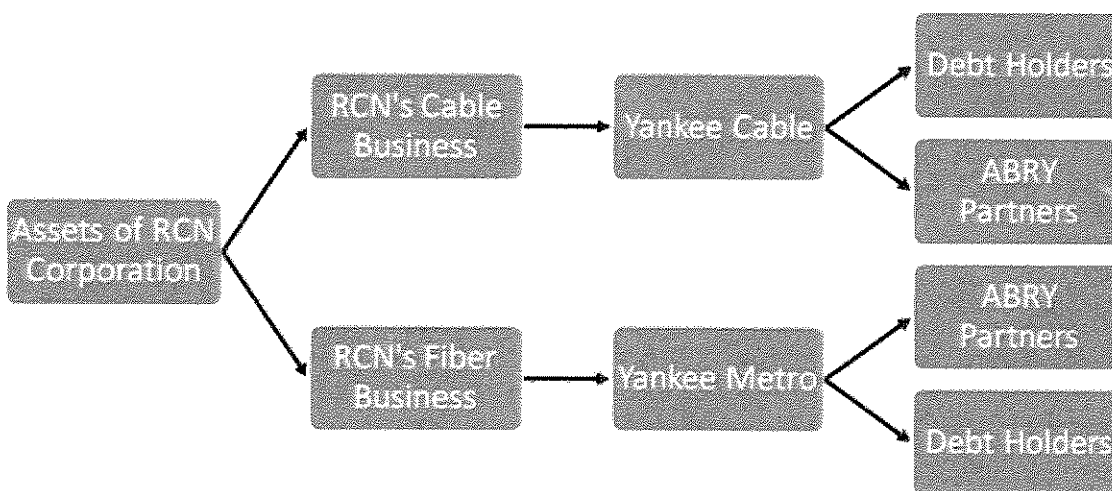
buildings on or near our network. We also have approximately 335,000 fiber strand miles, which highlights the fact that many of our metro and intercity rings are fiber-rich.”³

Because RCN has two very different businesses, a cable over-builder and a fiber access provider, one of the driving factors for both RCN and ultimately ABRY Partners appears to be the ability to decouple these two businesses and to allow each to be independently valued by investors.

In order to decouple these two businesses, a number of corporate reorganizations will be required to allow the two acquiring ABRY Partner organizations (Yankee Cable and Yankee Metro) to separately acquire the respective organizations from RCN. In simple terms, the reorganizations and acquisitions are outlined in the following chart (a complete detailed flow chart of the reorganizations and acquisitions is contained in Exhibit 2 attached to this Report).

Chart 1

[Current] [Reorganization] [Acquisition]



After the internal reorganization and the acquisition by Yankee Cable and Yankee Metro, the former RCN Corporation will technically be two separate companies. There will be management and service agreements in place for shared services and facilities, but the cable business and the fiber business will be both functionally and legally separate entities. Additionally, Yankee Cable and Yankee Metro will not be public companies and therefore will not be subject to annual reporting to shareholders and the SEC as RCN was. There will be no stock listed on a stock exchange or any trading by the public in these new companies.

ABRY Partners is acquiring RCN Corporation by proposing to acquire all of the outstanding stock of RCN for \$15.00 per share which, according to the RCN press release, is a 43% premium over the average closing price of the stock for the 30 days prior to the announcement.⁴ The total consideration being paid for RCN including the assumption of debt is in excess of \$1.2 billion.

³ RCN's 10K page 4

⁴ RCN's 8K filed March 5, 2010, Ex 99.1

The resulting acquisition by ABRY Partners, including the retirement of RCN's outstanding debt and equity, will cause the combined ABRY Partners' debt level to increase in excess of twenty percent (20%) from RCN's level of debt.⁵ Based on the outstanding amount of stock as of December 31, 2009, of approximately 35.6 million shares and the offering price of \$15.00 per share, ABRY Partners is investing \$534 million in RCN to acquire 100% control.

Yankee Cable has agreed to abide by the terms of the current franchise / OVS agreements and has no plans to change the management of the local cable systems. The role of the current senior management of RCN is unclear, which could impact the operations of the local systems.

REVIEW PROCESS

FCC Form 394

On March 17, 2010, March 22, 2010, March 23, 2010, and April 1, 2010, FCC Form 394s were filed with the Participating LGAs. The Form 394 was filed for the transfer of control of Starpower Communications, L.L.C. and RCN BecoCom LLC, subsidiaries of RCN, to Yankee Cable Acquisition, L.L.C., a wholly owned subsidiary of ABRY Partners VI, L.P. ("Yankee").⁶ The legal entities that currently hold the cable franchises, which grant the right to provide service, would remain unchanged. The Consultants were provided copies of this filed information.

Upon review, it was determined that additional information was required from RCN and Yankee Cable concerning the proposed transfer. The initial request was submitted on April 26, 2010, and a follow-up request was submitted May 13, 2010. RCN / Yankee Cable responded to the initial request by letter dated May 7, 2010. The response to the follow-up request was provided in two parts. The non-confidential information was provided by email on May 21, 2010 and the confidential information was provided by overnight delivery on May 24.

The Consultants' review was based on data made available by the Participating LGAs, RCN and Yankee Cable, and additional information relative to RCN and Yankee Cable that is publically available. This information was used to assess the financial capability of Yankee Cable to meet the franchise requirements and to continue operating the cable and OVS systems.

Our typical review and analyses of these types of transactions includes our development of financial models of cash flow, capital expenditures, revenues and customers. Due to the time constraints involved in this review and the lack of data supporting this transaction, the Consultants had to rely on information produced by RCN and Yankee Cable to build the models; we then evaluated the models based on our experience with costs in the industry. Exhibit 8 to this report shows our model of EBIT (earnings before interest and taxes) and cash flow. The model shows that (1) RCN/Yankee appears to have made a math error in computing revenues for 2011, which when corrected reduces revenues by \$8.25 million; and (2) changes, based on our experience, to direct expenses and selling, general and administrative expenses have a dramatic impact on the availability of cash.

Our findings from our review are discussed below.

⁵ See Exhibit 3.

⁶ The right to serve is in the form of a cable franchise in Montgomery County, MD, a Certificate of Public Convenience and Necessity for Cable Television in Arlington County, VA, and open video system ("OVS") agreements in the District of Columbia and City of Boston, MA.

RCN – PRE-TRANSFER

Attached as Exhibit 4 are excerpts from RCN Corporation's Form 10-K, filed with the Securities and Exchange Commission (the "SEC") for the fiscal period ended December 31, 2009. This describes the services and service areas of RCN and its business segments: (1) Residential/SMB - all-digital and high-definition video, high-speed internet and premium voice services to Residential and Small and Medium Business ("SMB") customers under the brand names of RCN and RCN Business Services, respectively; and (2) RCN Metro Optical Networks business unit ("RCN Metro") providing fiber-based high-capacity data transport services to large commercial customers, primarily large enterprises and carriers, targeting the metropolitan central business districts in its geographic markets.

From the information provided, RCN's residential/SMB and RCN Metro have experienced little growth in customers over the last 3 years (2007 through 2009) and no growth in revenue per customer. During this period, direct expenses have increased ████% and selling, general, and administrative expenses have decreased ████%. Cash and cash equivalents have increased ████% primarily due to recovery of the costs of assets used in the business (depreciation expense). RCN has reinvested approximately ████% of these amounts in additions to property, plant, and equipment.

RCN has disclosed that its major competitors have significant advantages and in head-to-head competition with Verizon it has lost video customers and had decreases in video revenue. Since video is the largest component of RCN's income, this is a major factor.

FINANCIAL CAPABILITY OF YANKEE CABLE

Yankee Cable, as a yet-to-be formed new entity, has no historical financial track record on which to assess its financial capabilities. The companies have instead asserted that ABRY Partners have the necessary financial capabilities, and have included confidential financial statements of ABRY Partners.⁷ Virtually all of the assets of ABRY Partners are investments in other companies. As such, ABRY Partners does not actually own any "hard" assets but rather investment vehicles in other companies. As stated in PricewaterhouseCoopers audit opinion of the financial statements, the "fair values [of the investments] have been estimated by the General Partner in the absence of readily ascertainable market values."

In order to investigate Yankee Cable's financial capability, RCN/Yankee Cable was asked:

In Exhibit 111.2, "Yankee Cable submits that it has the necessary financial commitments to consummate the transaction described herein as provided in the Merger Agreement and to provide adequate working capital to meet the system's needs for the foreseeable future." Please provide the underlying financial information, analyses, projections and other similar financial documents (in addition to the Confidential Financial Statements of ARBY Partners VI, L.P.) that will allow us to replicate and verify these financial commitments, including projections used by Yankee Cable to conclude it has the necessary capital for the "foreseeable future."

RCN/Yankee Cable responded:

ABRY Partners VI, L.P.'s confidential financial statements have been provided to Miller and Van Eaton, PLLC. Confidential financial information on the sources and uses of debt financing and projected cable cash flow relevant to question 2 are attached as Exhibit A and Exhibit B.

⁷ See Exhibit 1.

The response did provide some useful information regarding the sources and uses of the funds from ABRY Partners to complete this transaction. RCN/Yankee Cable also provided consolidated financial projections in response to request 19, which was attached to their response as confidential Exhibit I, and is attached as Exhibit 5 to this Report. RCN/Yankee Cable provided further documentation and details but has not provided the assumptions used to create these projections. From the review of Exhibits 5 and 6, including the provided B(2) in Exhibit 5, it appears that Yankee Cable may have underestimated programming cost increases and may have overestimated its ability to increase revenues without any significant customer acquisitions. The projections show no growth in customers, declines in revenue generating units, and slight growth in revenue per customer

In request 12 d, RCN/Yankee Cable was asked to provide:

Metro Financing and Cable Financing agreements including all schedules and supporting documentation identified in sub section (a)

RCN/Yankee Cable responded:

The Metro Financing agreement is irrelevant to Yankee Cable's legal, technical, and financial qualifications to own Starpower and RCN BecoCom, and is still being negotiated, with pricing to be established upon syndication. The Cable Financing agreement is still being negotiated, with pricing to be established upon syndication.

Again this calls into question how a financial projection can be prepared without having a final price on the debt being considered as part of the transaction. What has been provided shows that interest expenses for the RCN cable business will almost double as a result of this transaction.

POTENTIAL ISSUES

Based on the foregoing, we have identified several potential issues with the acquisition by Yankee Cable of RCN's cable properties. Because of the lack of access to the underlying assumptions used by Yankee Cable in its due diligence and its financial projections with respect to RCN's cable properties, we cannot determine if any of these potential issues will occur or which potential issues is more likely to occur. The identified potential issues are:

Overly optimistic projections resulting in increased financing requirements and/or increased cable rates;

Continuation of a no or limited growth philosophy resulting in the potential loss of market share;

Short-term investment strategy by ABRY Partners resulting in limited capital expansion of existing footprint; and

Risk of financial market downturn resulting in the inability to raise either the debt or equity funds.

Optimistic Projections

The projections provided by RCN/Yankee Cable in Exhibits 5 and 6 suggest that its compound annual growth rates in revenues will be less than half of what it is projecting for its direct costs (basically programming costs). This would result in reducing overall margins because the projections show a declining customer penetration percentage. Additionally, the compounded annual growth rates in direct expenses seem overly optimistic as cable operators have been publically complaining that programming costs are increasing at a rate well in excess of inflation. Specifically, according to Comcast's 2009 SEC Form 10K, page 26,

Comcast, the largest cable operator with reputedly some of the lowest programming costs, saw such costs increase 11.5% from 2007 to 2008 and another 8.8% from 2008 to 2009. The projections provided (see Exhibits 5 and 6) do not show direct cost increases anywhere near those reported by Comcast and call into question these projections. If the new Yankee Cable experiences programming increases along the lines of what Comcast has reported, the resulting operating cash flow could be significantly impacted and lead to the need for ABRY Partners to infuse more equity into Yankee Cable or, even worse, cause Yankee Cable to dramatically increase its cable prices in order to maintain these projected margins. Likewise, the projections show declining growth rates for its general and administrative expenses. This too seems overly optimistic. While it does appear that Yankee Cable will incur severance costs, the elimination of senior executive staff would not necessarily suggest that G&A expenses would decline. Attached as Exhibit 8 are revised projections using a higher growth rate in direct costs and annual growth in G&A expenses. This scenario results in negative free cash flow in several years that would require additional debt and/or equity infusions if the revenue projections remain static. In order to counteract this negative free cash flow, Yankee Cable could also propose increasing cable, phone and data rates more than in the current projections.

Growth Philosophy

In a similar vein, the customer growth projections of Exhibit 5 do not appear to be consistent with cable industry averages. Essentially, it does not appear that RCN has historically employed a strong customer growth philosophy of increasing its marketable homes and working hard to grow its customer base. This is accomplished by expanding the territory where service is available, commonly known as build-out, and with marketing. Instead Yankee Cable appears to be trying maintain what it already has. Exhibit 6, a copy of confidential Exhibit B of the May 7 response, as compared to Exhibit 7, a copy of the confidential Section 5.1(a) of the information provided to the Participating LGAs, shows a projected ██████% reduction in capital expenditures. It does not appear any funds will be expended on expanding the service territory. RCN and Yankee Cable have asserted that some of this is due to the reduced capital needs to move the systems to an all digital platform in 2008 and 2009. As with the optimistic projection issue, any downturn in customer penetration percentages could dramatically affect the resulting financial projections. This could cause Yankee Cable to need more working capital from ABRY Partners and it could impact its ability to service its increased debt load.

Short-term Investment

While, in response to a request, ABRY Partners has suggested that it has no predefined plans or exit strategy for its investment in Yankee Cable, it is entirely possible that ABRY Partners only plans on keeping its investment in Yankee Cable until it can realize a substantial return for its limited and general partners. Cable multiples are currently below historical levels, in part due to the current economic conditions, which suggests that as the economy returns to more normal levels, ABRY Partners investment in Yankee Cable will become more valuable. This could result in a sale to a current competitor like Verizon or Comcast or to another investment partner. With this potential, it is possible that Yankee Cable will likely keep its capital expenditures to a minimum so that it could increase the size of its ultimate return. Reduction in capital expenditures will not allow Yankee Cable to grow, as Yankee Cable will need capital to open new service areas. Also, this could mean that there will be another transfer request coming before the local authority in the near term.

Financial Market Downturn

As has occurred in the recent past, a downturn in the economy can cause the debt and equity markets to restrict financing activities. While it appears that ABRY Partners and its debt participants have made commitments to fund Yankee Cable, it would not be unrealistic to assume that these commitments had “out” clauses. Information concerning this debt was requested but was not provided. As such, if the economy falters it is possible that the debt covenants may not be achieved or that the credit terms will be stricter causing the debt holders to require additional equity commitments from ABRY Partners. This could have a negative impact on the profitability of Yankee Cable.

CONCLUSIONS

As identified in this final Report, there are potential red flags that suggest that the projected financial picture of Yankee Cable presented to the Participating LGAs might be overly optimistic, potentially resulting in the need for more capital, the need to increase rates, and/or the need to divest these properties. On balance though, the same operational and financial concerns, other than those arising as a result of the sale, apply to RCN’s cable business as it exists today.

About the Consultants

Ashpaugh & Sculco, CPAs PLC

Ashpaugh & Sculco ("A&S") was formed by Garth Ashpaugh and Carolyn Sculco December 1, 1999. A&S provides consulting services primarily to local government entities. Specifically, our services include franchise fee reviews, cable television rate filing reviews, franchise agreement analyses including renewals and financial analyses of new applicants, rate and cost of service studies, and litigation services and expert testimony. Garth has worked for over 200 cities and counties since 1992.

Garth has been engaged in utility matters and regulation full-time for over thirty years. His previous experience includes consulting since 1991 and working as Audit Supervisor with the Missouri Public Service Commission. He has a BS, Business Administration, from the University of Missouri, holds licenses as a Certified Public Accountant in the states of Missouri and Florida and maintains professional affiliations with the American Institute of Certified Public Accountants and National Association of Telecommunications Officers and Advisors.

Front Range Consulting, Inc.

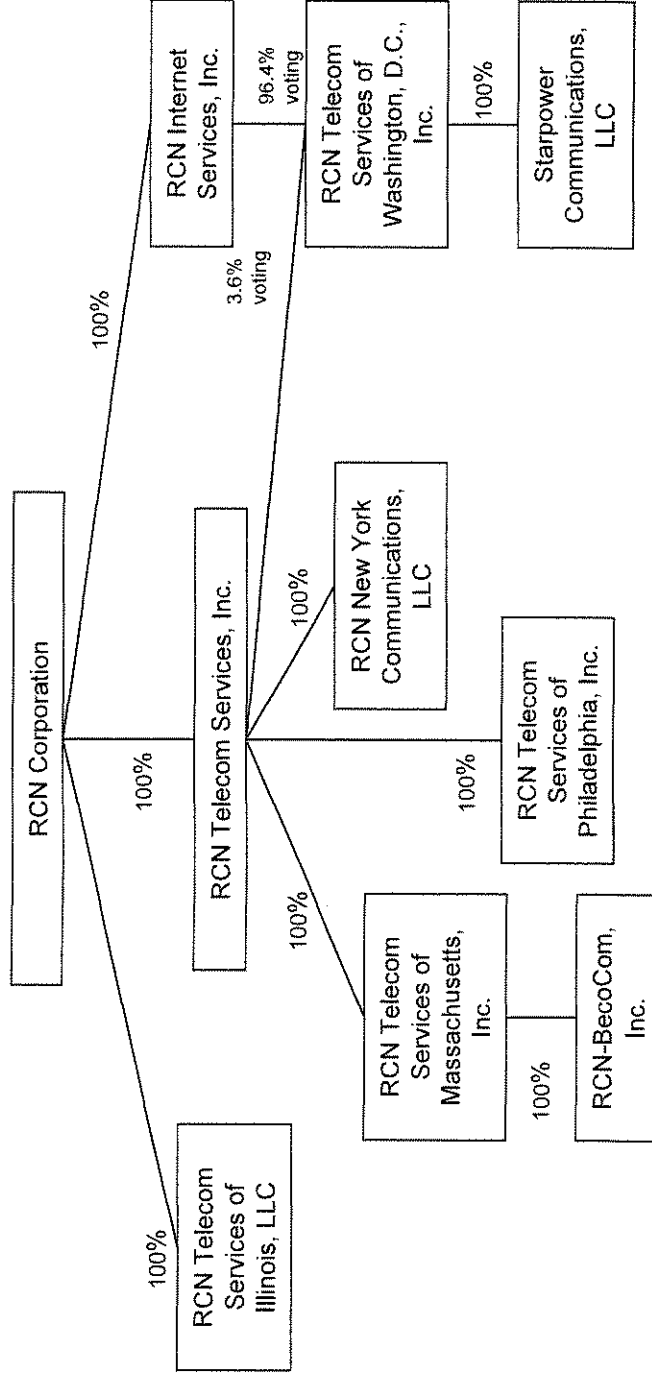
Front Range Consulting, Inc. (FRC) was formed in 2002 by Mr. Richard D. Treich, formerly Senior Vice President, Rate and Regulatory Matters at AT&T Broadband. Mr. Treich serves as FRC's CEO and is responsible for the strategic direction of the company and all of the consulting activities of FRC. In forming the company Mr. Treich decided to use his ten years of Cable TV knowledge with AT&T and its predecessor TCI and twenty years of utility regulatory knowledge to assist clients in the governmental telecommunications sector. The firm is dedicated to this arena. FRC assists governmental entities with a variety of professional services in the telecommunications arena including: Financial Analyses including Franchise Transfers and Renewals; Franchise Fee Reviews and Audits; FCC Rate Regulatory Filings (Forms 1205, 1210 and 1240); Effective Competition Filings; Customer Service Standards and Reviews; and Regulatory and Litigation Support.

ABRY Partners Financial Statements

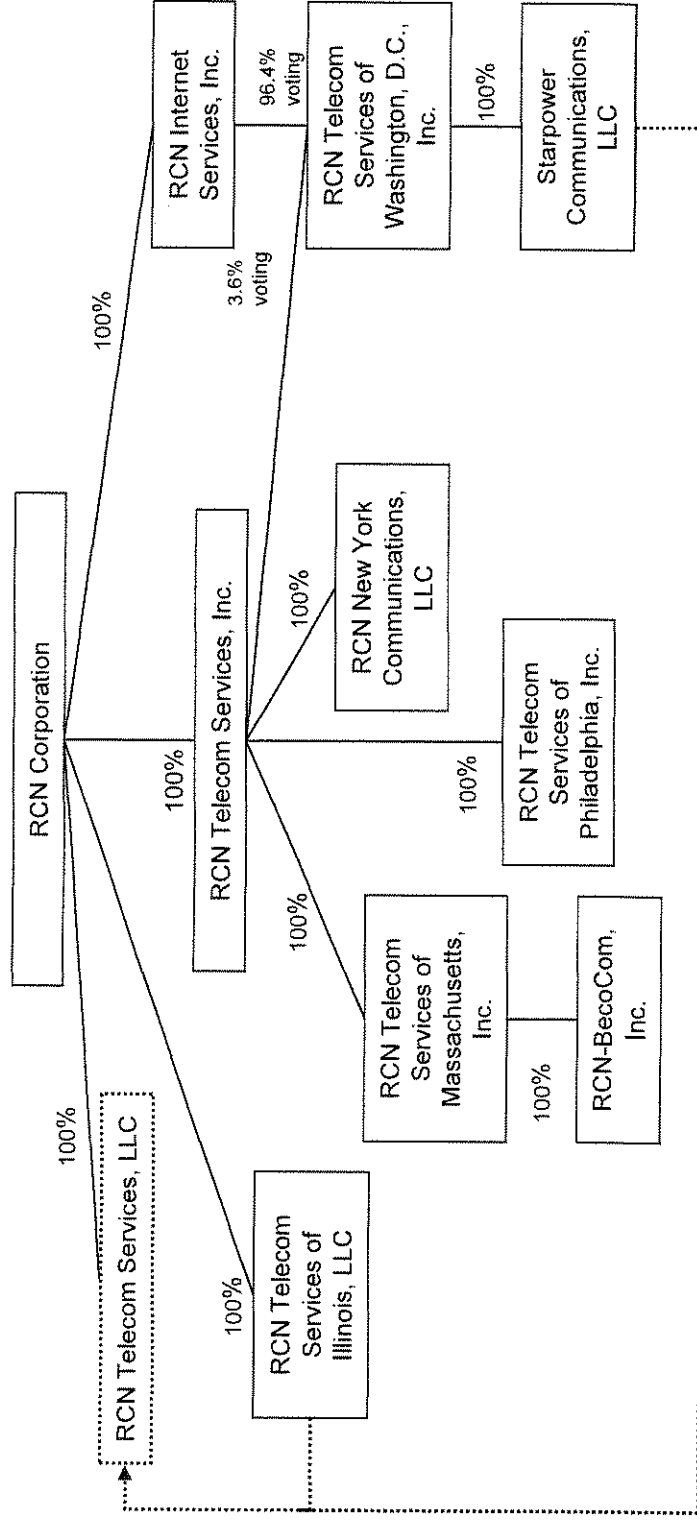
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Reorganization Flow Charts

Pre-Transaction Corporate Structure of RCN Corporation



Interim Steps

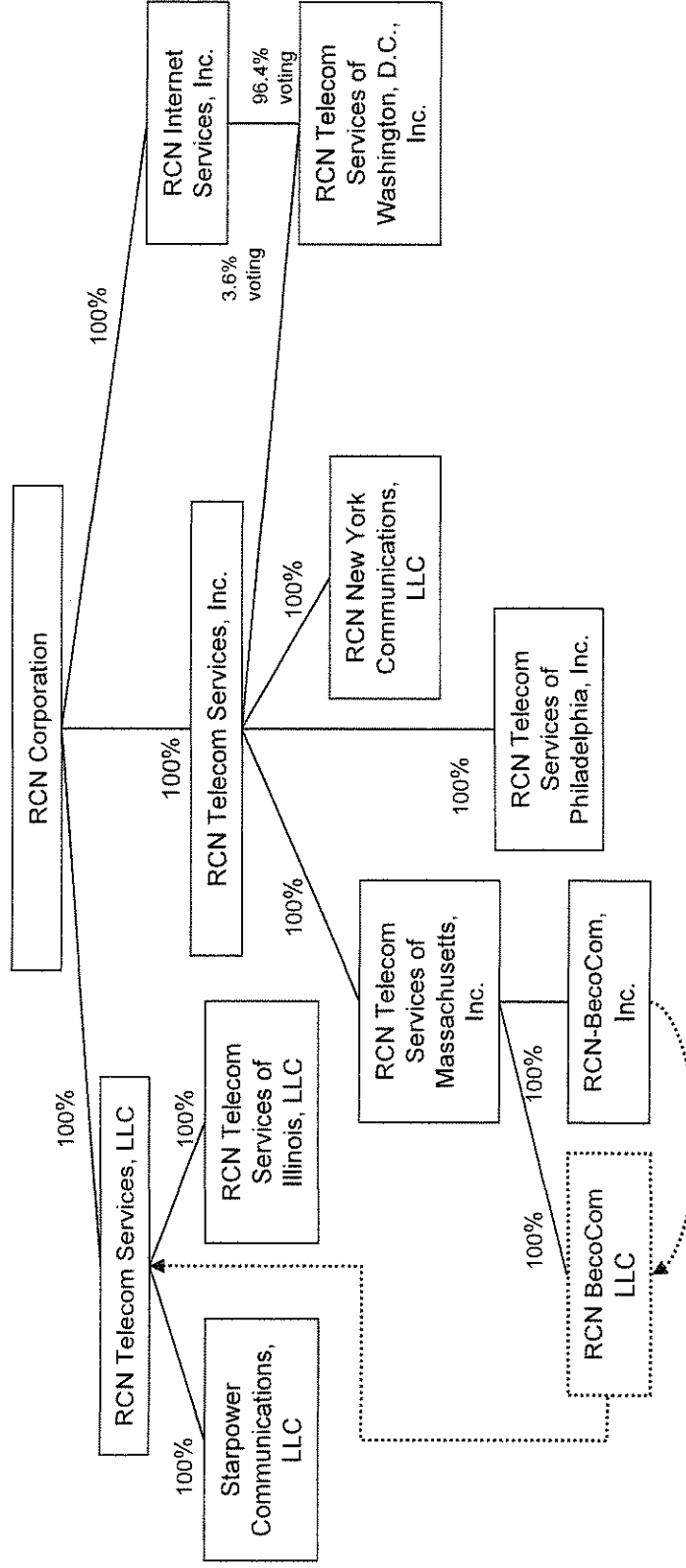


RCN Corporation forms RCN Telecom Services, LLC (aka Cable Opco).

Interest in RCN Telecom Services of Illinois, LLC is assigned to RCN Telecom Services, LLC.

RCN Telecom Services of Washington D.C., Inc.'s Interest in Starpower Communications, LLC is assigned to RCN Telecom Services, LLC.

Interim Steps

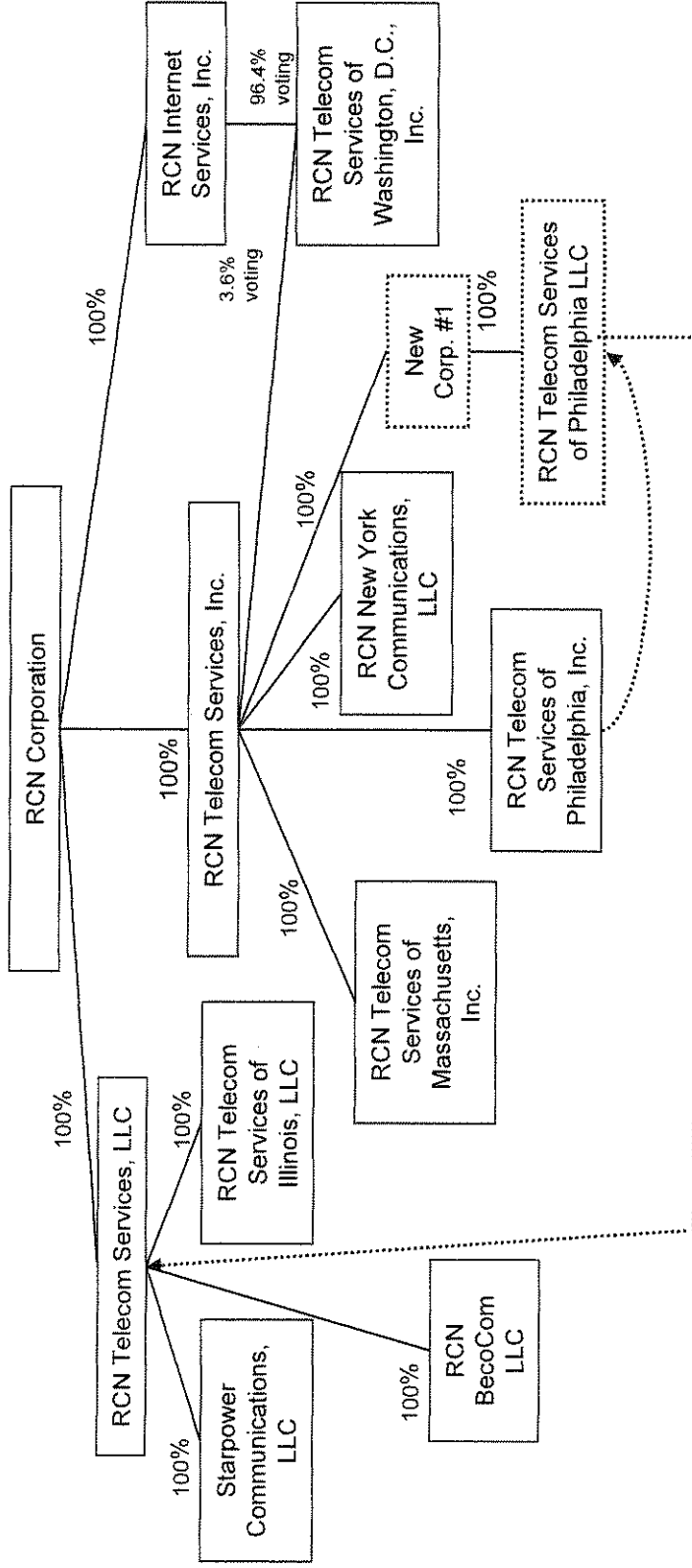


RCN Telecom Services of Massachusetts, Inc. forms RCN BecoCom LLC.

RCN-BecoCom, Inc. merges into RCN BecoCom LLC, with RCN BecoCom LLC surviving.

RCN Telecom Services of Massachusetts, Inc. assigns its interest in RCN BecoCom LLC to RCN Telecom Services, LLC.

Interim Steps



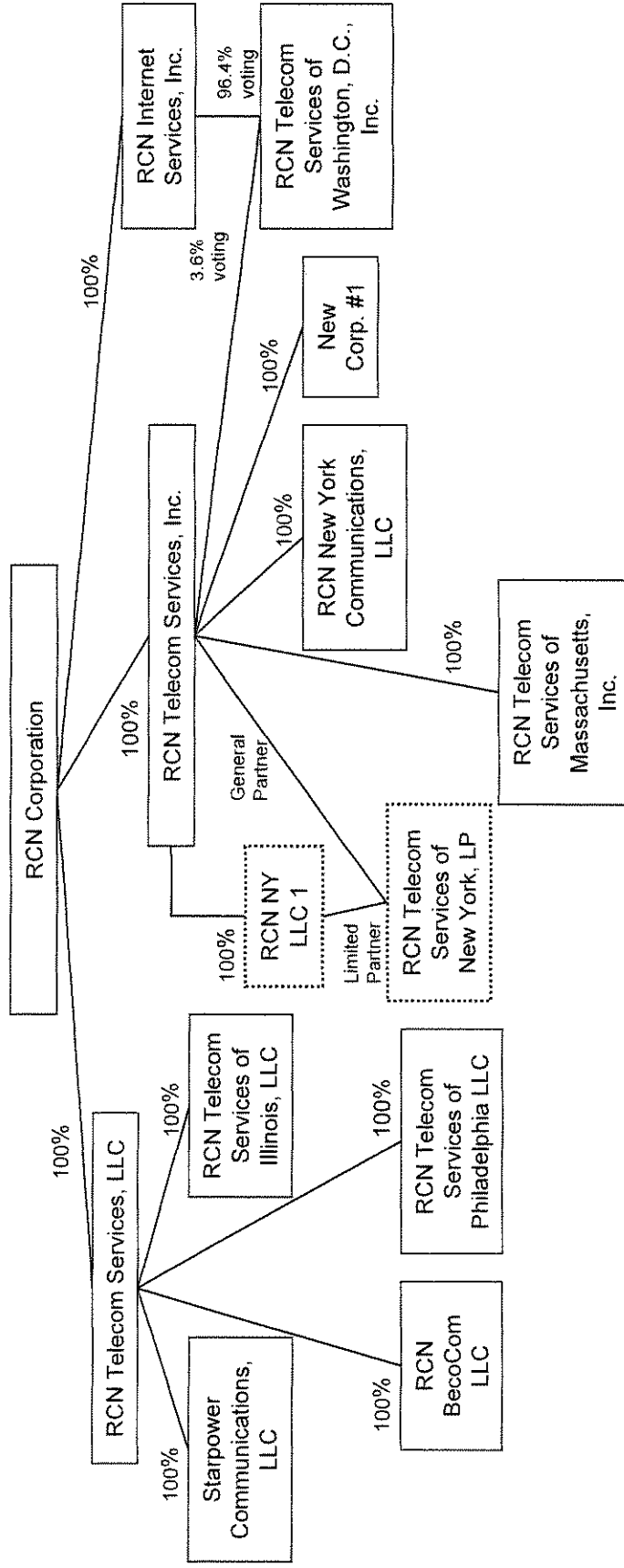
RCN Telecom Services, Inc. forms New Corp. #1 (aka RCN PA Newco).

New Corp. #1 forms RCN Telecom Services of Philadelphia LLC.

RCN Telecom Services of Philadelphia, Inc. merges into RCN Telecom Services of Philadelphia LLC, with RCN Telecom Services of Philadelphia LLC surviving.

Interest in RCN Telecom Services of Philadelphia LLC is assigned to RCN Telecom Services, LLC.

Interim Steps



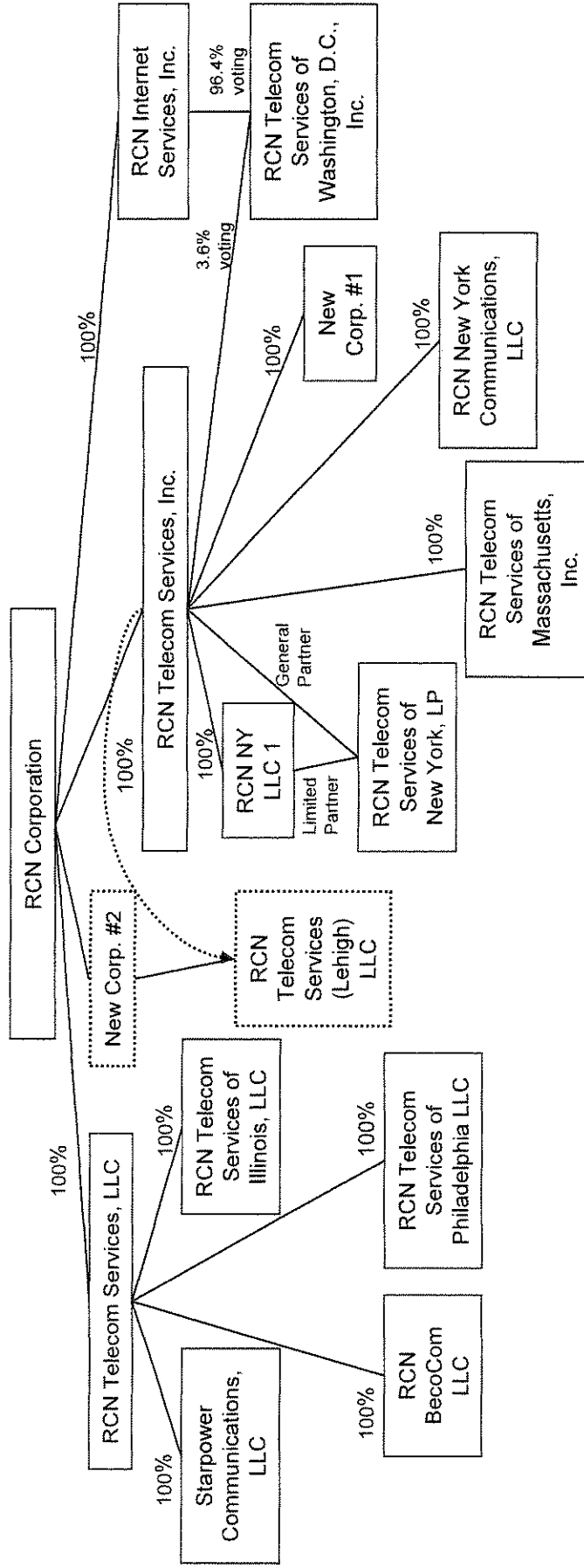
RCN Telecom Services forms and RCN NY LLC 1 and assigns New York assets to RCN NY LLC 1.

RCN Telecom Services, Inc. forms RCN Telecom Services of New York, LP (aka RCN TS NY LP).

RCN NY LLC 1 assigns New York assets to RCN Telecom Services of New York, LP for a limited partnership interest.

RCN Telecom Services, Inc. assigns assets to RCN Telecom Services of New York, LP for a general partnership interest.

Interim Steps

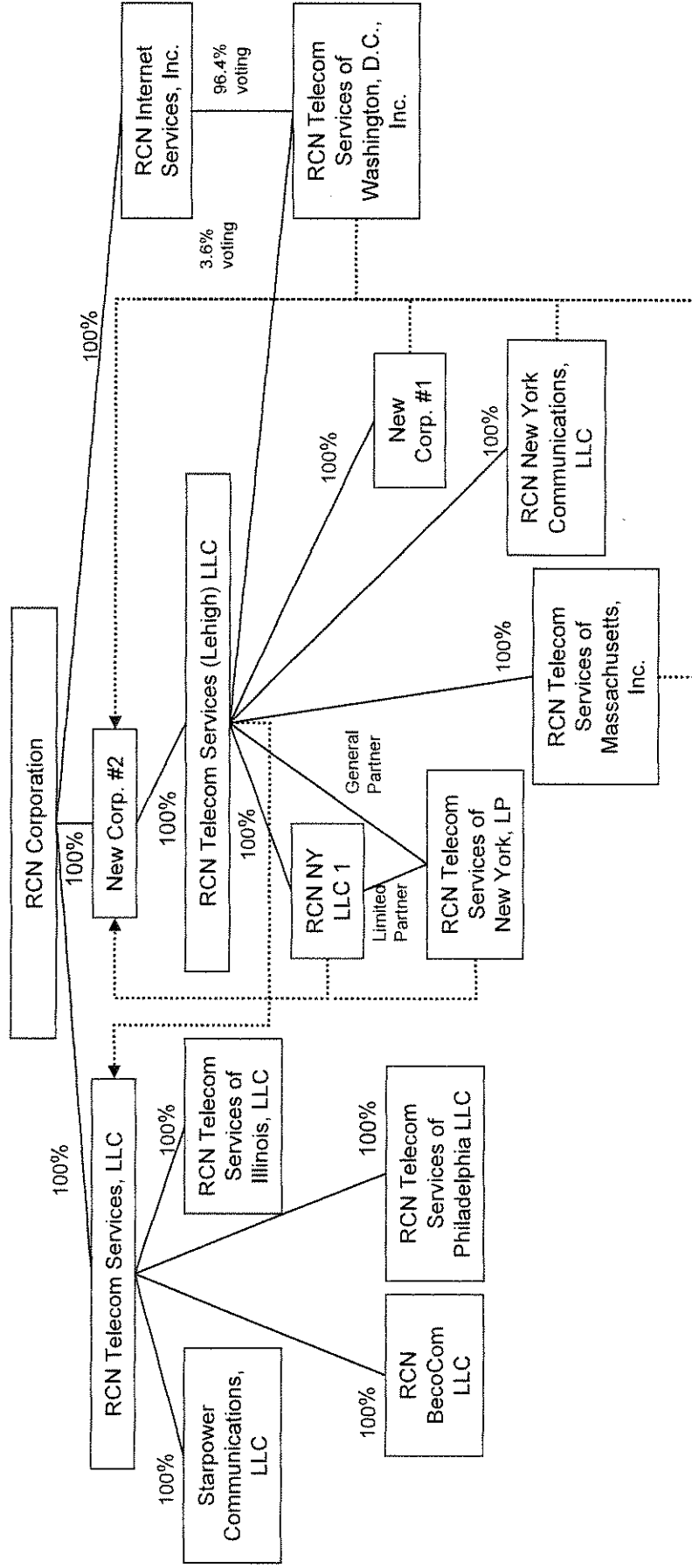


RCN Corporation forms New Corp. #2 (aka RCN NY Newco).

New Corp. #2 forms RCN Telecom Services (Lehigh) LLC

RCN Telecom Services, Inc. merges into RCN Telecom Services (Lehigh) LLC, with RCN Telecom Services (Lehigh) LLC surviving.

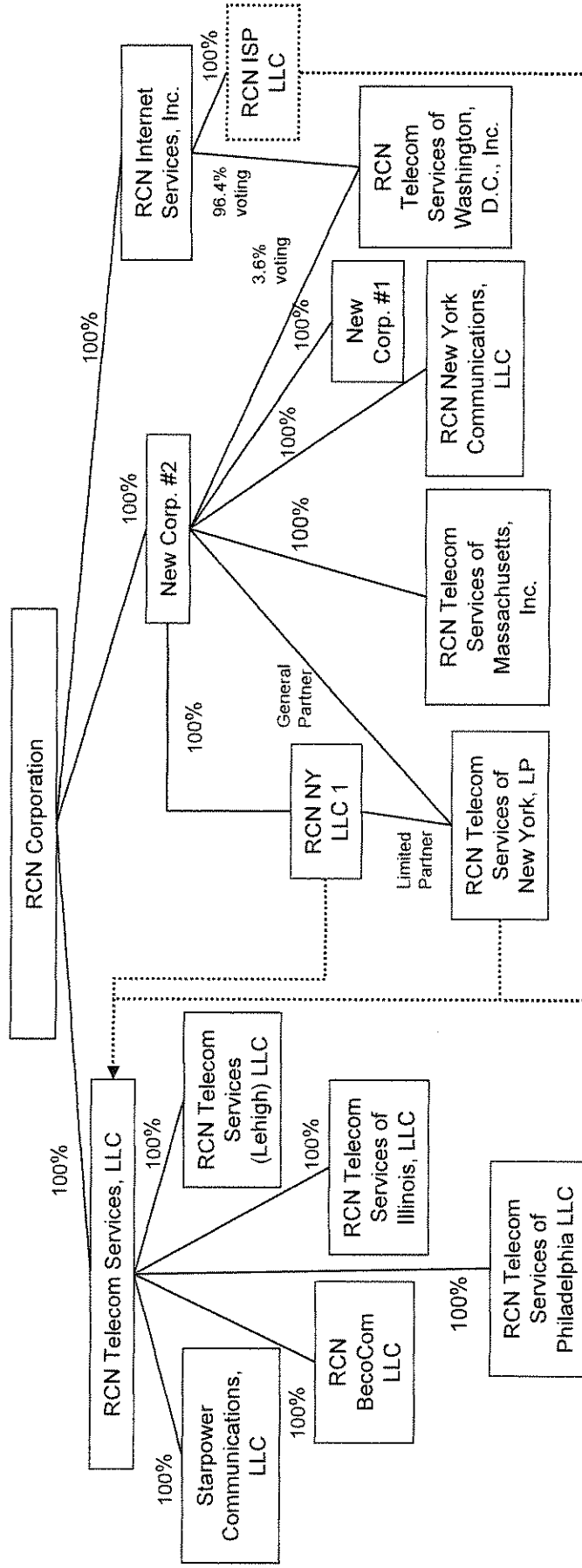
Interim Steps



Interest in RCN Telecom Services of New York, LP, RCN NY LLC 1, New Corp. #1, RCN New York Communications, LLC, RCN Telecom Services of Massachusetts, Inc., and RCN Telecom Services of Washington, D.C., Inc. is assigned to New Corp. #2.

New Corp. #2 assigns its interests in RCN Telecom Services (Lehigh) LLC to RCN Telecom Services, LLC.

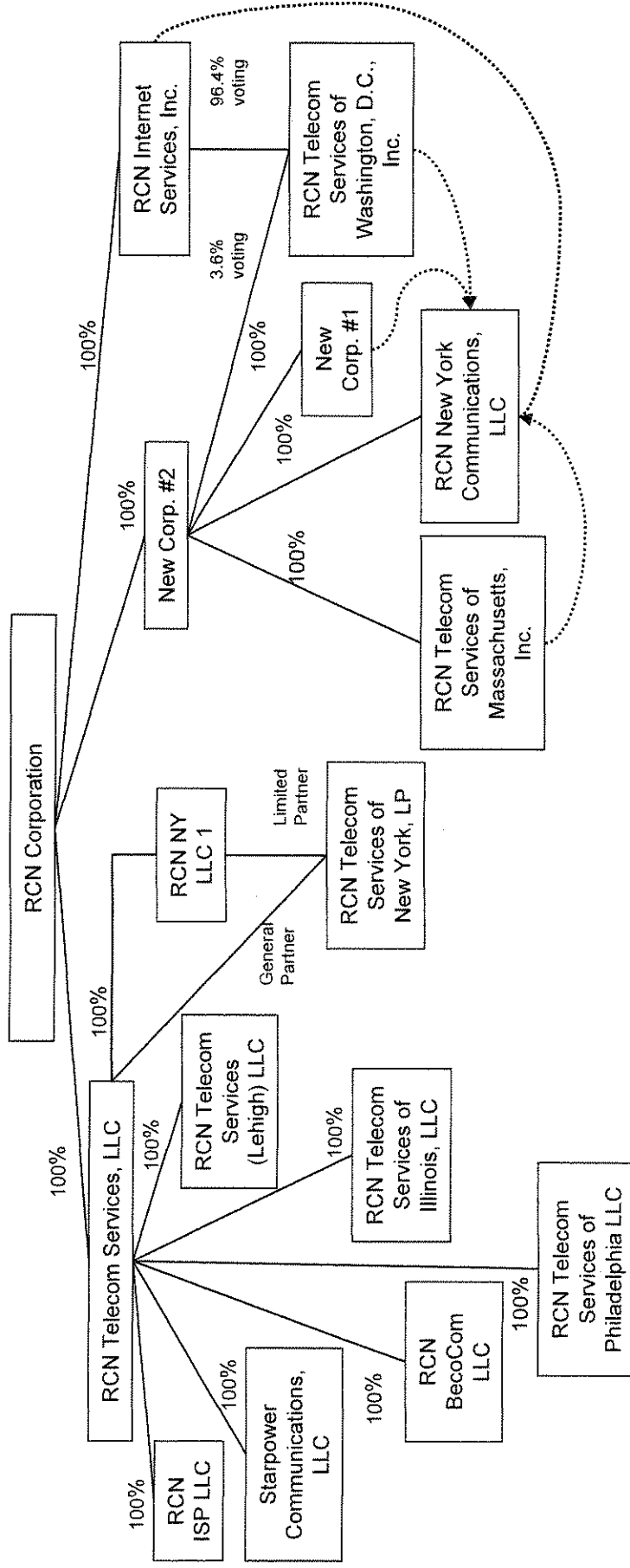
Interim Steps



New Corp. #2 assigns interest in RCN NY LLC 1 and RCN Telecom Services of New York, LP to RCN Telecom Services, LLC.

RCN Internet Services, Inc. forms RCN ISP LLC and assigns its interest to RCN Telecom Services, LLC.

Interim Steps



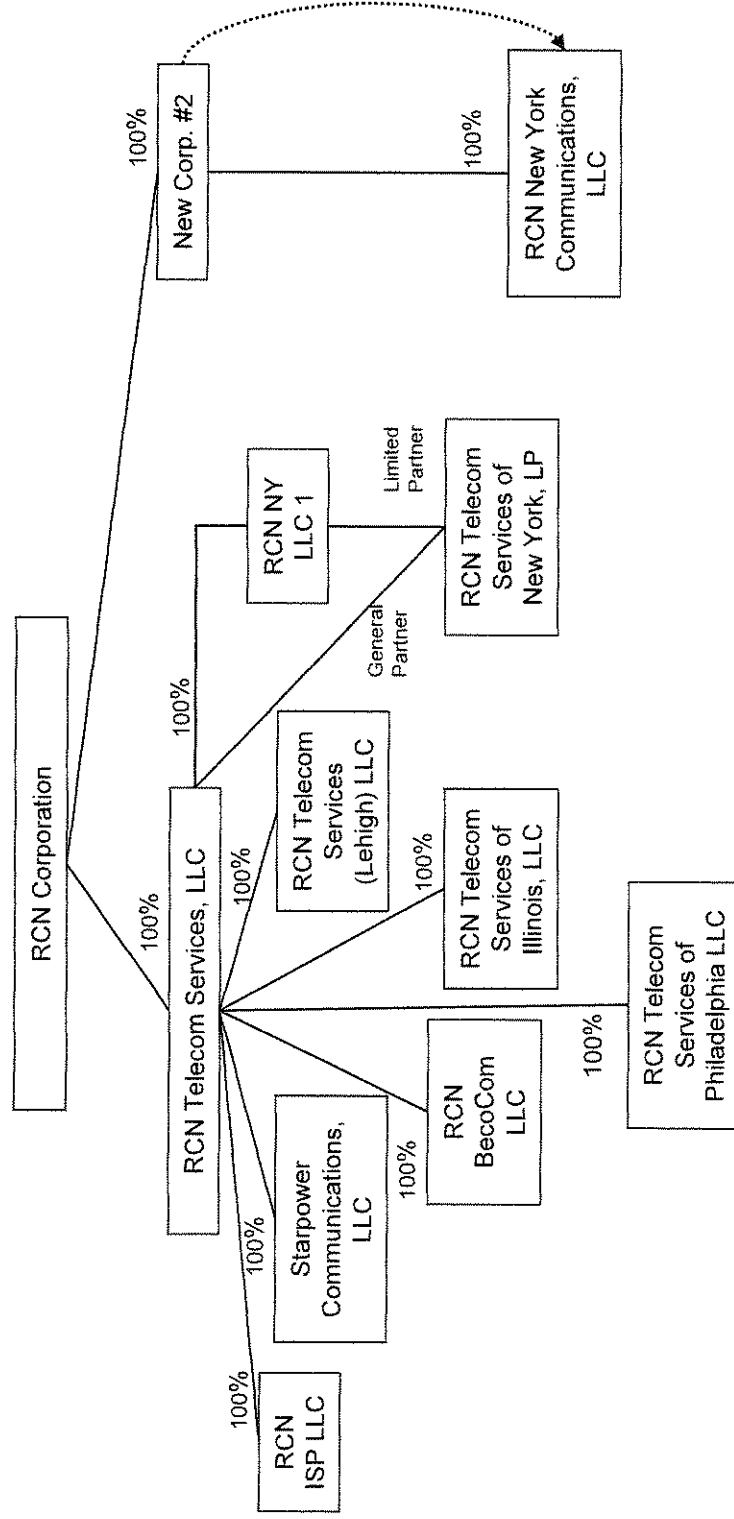
RCN Telecom Services of Massachusetts, Inc. adopts plan of liquidation, distributes its remaining assets (cash) to RCN Corporation, and merges into RCN New York Communications, LLC with RCN New York Communications, LLC surviving.

New Corp. #1 adopts plan of liquidation, distributes its remaining assets to RCN Corporation, and merges into RCN New York Communications, LLC with RCN New York Communications, LLC surviving.

RCN Internet Services, Inc. adopts plan of liquidation, distributes its remaining assets to RCN Corporation, and merges into RCN New York Communications, LLC with RCN New York Communications, LLC surviving.

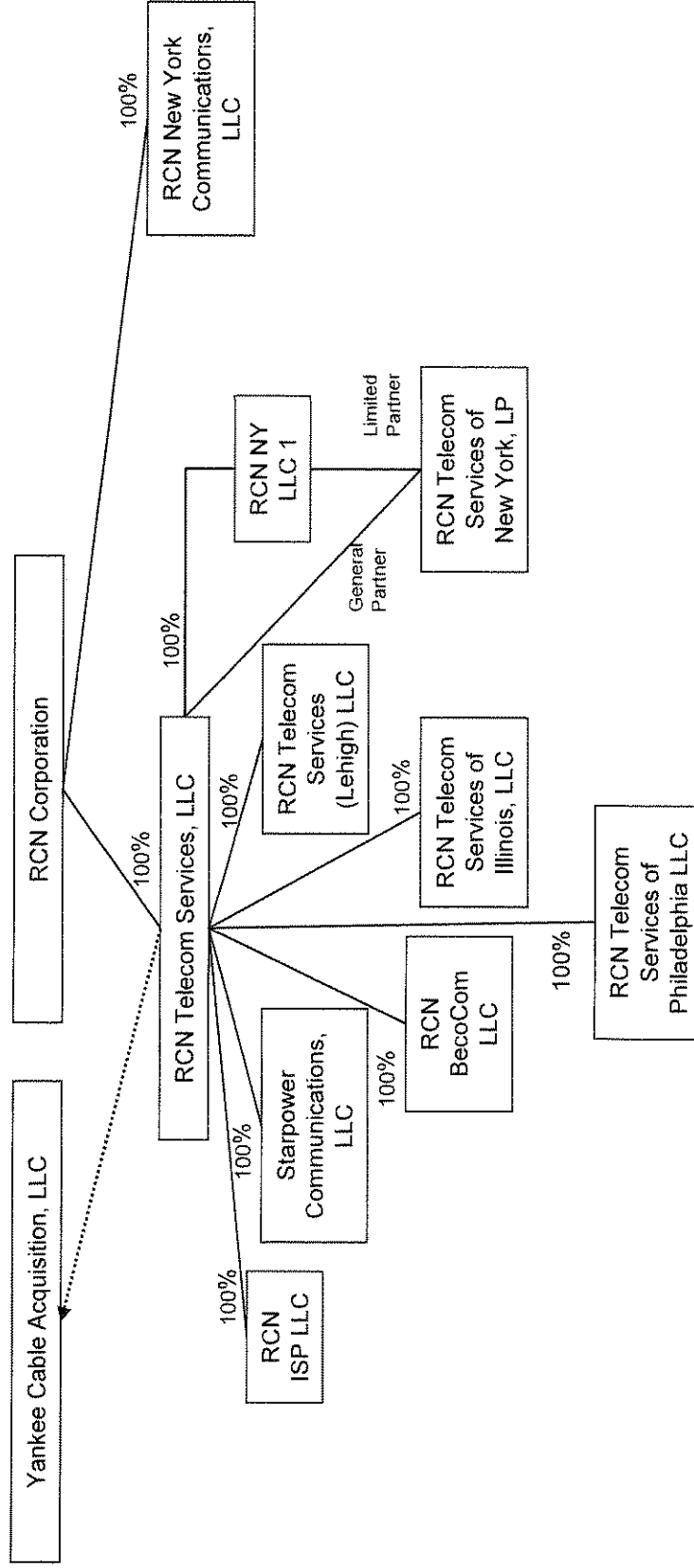
RCN Telecom Services of Washington, D.C., Inc. adopts plan of liquidation, distributes its remaining assets to RCN Corporation, and merges into RCN New York Communications, LLC with RCN New York Communications, LLC surviving.

Interim Steps



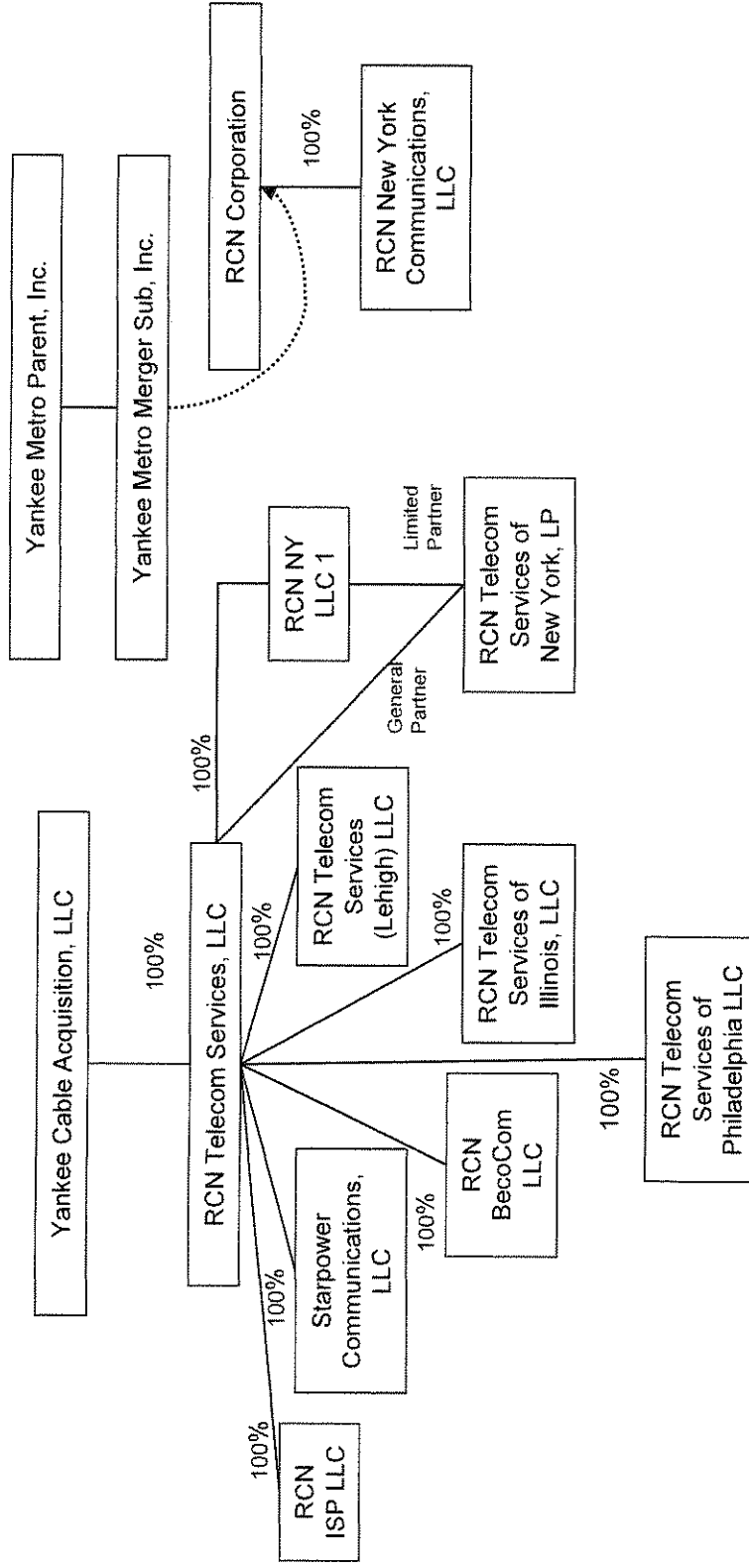
New Corp. 2 adopts plan of liquidation, distributes its remaining assets to RCN Corporation, and merges into RCN New York Communications, LLC with RCN New York Communications, LLC surviving.

Transfer of Control



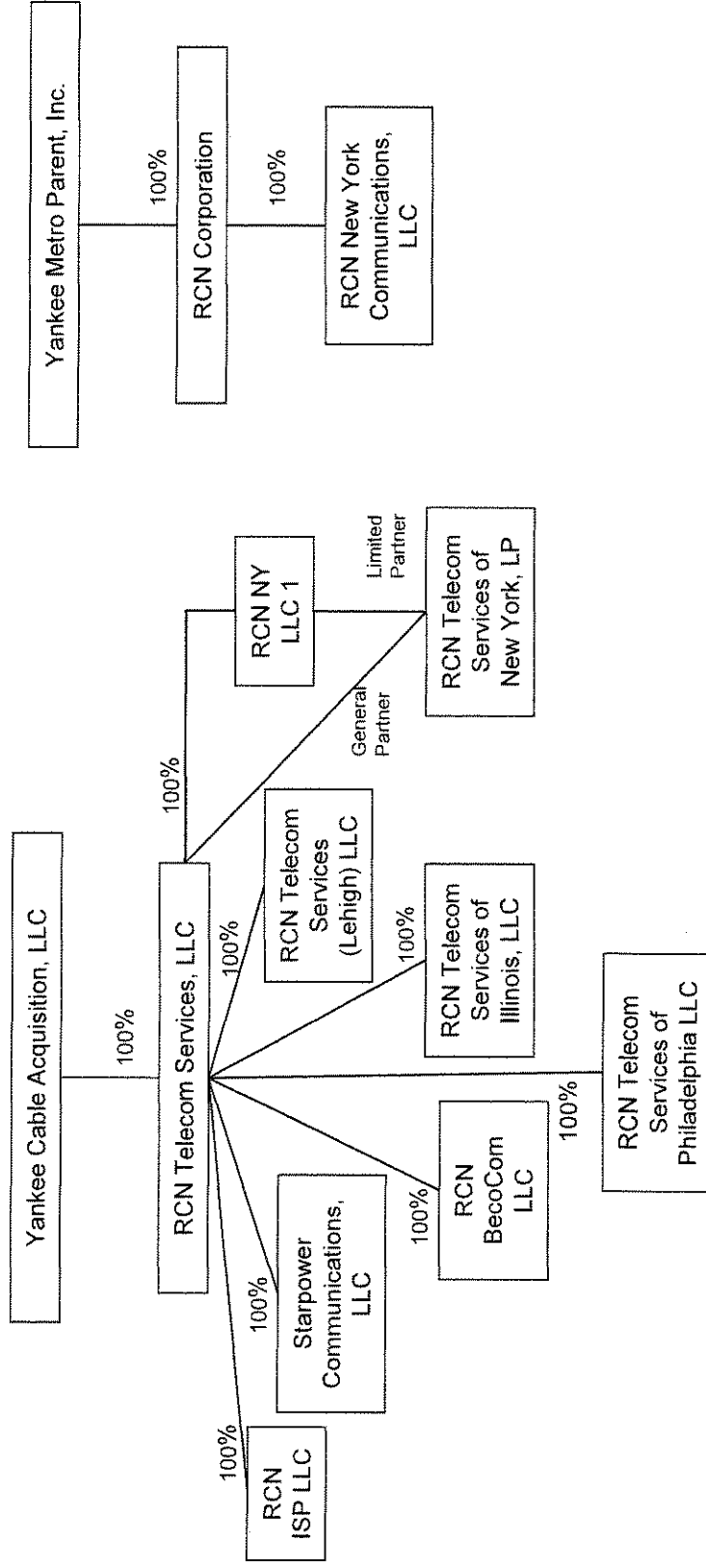
Yankee Cable Acquisition, LLC purchases all of the interest in RCN Telecom Services, LLC.

Transfer of Control



Yankee Metro Merger Sub, Inc. merges into RCN Corporation with RCN Corporation surviving.

Post-Transaction Corporate Structure



Debt & Equity Analysis

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Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

RCN is a competitive broadband services provider, delivering all-digital and high-definition video, high-speed internet and premium voice services to Residential and Small and Medium Business ("SMB") customers under the brand names of RCN and RCN Business Services, respectively. In addition, through our RCN Metro Optical Networks business unit ("RCN Metro"), we deliver fiber-based high-capacity data transport services to large commercial customers, primarily large enterprises and carriers, targeting the metropolitan central business districts in our geographic markets. We construct and operate our own networks, and our primary service areas include: Washington, D.C., Philadelphia, Lehigh Valley (PA), New York City, Boston and Chicago.

Subsequent to the Company's acquisition of NEON Communications Group, Inc. ("NEON") in November 2007, management reorganized RCN's business into two key segments: (i) Residential/SMB and (ii) RCN Metro. There is substantial managerial, network, operational support and product overlap between the Residential and SMB businesses and, as a result, we had historically reported these two businesses as one segment. RCN Metro, however, is managed separately from the other two business units, with separate network operations, engineering, and sales personnel, as well as separate systems, processes, products, customers and financial measures. Management of the Company's two key businesses is unified only at the most senior executive levels of the Company. Therefore, beginning with the results of operations for 2008, the financial results of the RCN Metro business unit are reported as a separate segment in accordance with the requirements of FASB ASC Topic 280 and applicable SEC regulations.

All prior period amounts in this Report have been restated to present the results as two separate reportable segments. For financial and other information about our segments, refer to Item 8, Note 15 to our Consolidated Financial Statements included in this Annual Report. All of the Company's operations are in the United States. Our Residential/SMB segment, which serves approximately 429,000 Residential and SMB customers generated approximately 75% of our consolidated revenues and the RCN Metro segment generated approximately 25% for 2009.

Residential / SMB Segment

In 2009, our Residential/SMB segment generated approximately 75% of our consolidated revenues (see Note 15 "Financial Data by Business Segment" to our Consolidated Financial Statements). Through our RCN and RCN Business Services business units, we offer video, telephone, and high-speed Internet products to residential and SMB customers. Customers can purchase our products on an a la carte basis, or they may choose to bundle multiple services into a single subscription with single billing and a single point of installation and support. Customers who bundle services typically receive those services at a discount to the sum of the a la carte prices of the individual products. Our bundle approach reduces operating costs due to efficiencies in customer care, billing, and support, and we believe offers our customers a greater value. Approximately 67% of our current customer base purchases bundled products.

Video Services

Our video service delivers multiple channels of television programming to subscribers who pay a monthly recurring fee. Subscription rates and other related charges vary depending on the type of service selected and equipment used by the subscriber. We offer varied channel line-ups in each system serving a particular geographic market. Channel offerings are in accordance with

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

applicable local and federal regulatory requirements and are also based on programming preferences and demographics in each of our markets. We receive television signals delivered from television networks over-the-air, by fiber-optic transport, or via satellite delivery to our antennas, microwave relay stations and satellite earth stations. We aggregate and organize these signals in our technical facilities and deliver a specified lineup of programming services to our subscribers in an all-digital format.

Our video services include:

- *Basic and Signature Services* : Our video customers receive a package of basic programming that generally consists of local broadcast television stations, local community programming (including governmental and public access), and limited satellite-delivered or non-broadcast channels. The basic channel line-up generally includes up to 50 channels. Our "Signature" or expanded basic programming package includes approximately 150 additional channels, including many popular regional and national cable networks. Both of these service levels are delivered in a 100% digital viewing format for all customers.
- *Enhanced Digital Services* : We offer additional programming content to customers who desire broader programming choices through our "Premiere" service package, which includes nearly a hundred additional channels, such as special interest networks, movie and entertainment networks.
- *Premium Channels* : Our customers can also purchase premium movie and entertainment channels, such as Showtime, HBO, Starz, and Encore on an a la carte basis for a monthly fee. All such services include related video on demand content as part of the monthly subscription. We also provide foreign language programming for an additional monthly fee.
- *High-Definition Television ("HDTV")*: Our HDTV service provides customers who utilize advanced digital set-top boxes with improved, high-resolution picture quality, improved audio quality and a wide screen format. We currently offer our HDTV customers 100+ high-definition channels in most areas, including most broadcast networks, leading national cable networks, regional sports networks, and premium channels. In addition, our HDTV customers have access to selected VOD content in high-definition format.
- *Video on Demand ("VOD") and Subscription Video on Demand ("SVOD")* : Our VOD service provides customers with access to an extensive library of movies and other television content with control over the timing and playback of that content. A substantial portion of this content is free to our customers, and we continue to expand our library as more content becomes available. RCN also offers SVOD services which provide our customers with on demand access to additional content that is either associated with premium content to which they subscribe, or made available for an additional fee.
- *Digital Video Recorder ("DVR")* : RCN offers a dual-tuner High-Definition DVR set-top box that allows our customers to record one program while viewing another whether it is recorded in standard definition or highdefinition. DVR technology affords the ability to our customers to digitally record, store and play television programs without the inconvenience of tapes or DVDs. In 2009, RCN entered into an agreement with TiVo Inc. whereby RCN will offer co-branded, uniquely configured TiVo High Definition DVRs to its Residential and SMB customers. Expected to launch in the second quarter of 2010, the RCN TiVo DVR is a truly innovative

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

convergence of video and broadband programming controlled through a single user interface that is simple, intuitive, and dramatically different from that of other DVRs. The RCN TiVo DVR will give customers a first of its kind video experience by fully integrating RCN's digital programming and VOD library with a wide variety of broadband delivered video programming, providing access to a vast library of programming not available through traditional cable or satellite services.

- *Pay-Per-View ("PPV")* : Our PPV service provides customers with the ability to order, for a separate fee, movies as well as "Big Event" programming such as sporting events or music concerts on an unedited, commercial-free basis.
- *Lehigh Valley Studio*: We operate a video production studio located in Lehigh Valley, Pennsylvania, where we produce sports, news, and entertainment programs focused on community and local interest in our markets. Much of this RCN-produced content is made available on an on-demand basis through our VOD platform.
- *Bulk Video Services*: We provide video services to hotels, hospitals, universities, and other organizations seeking to deliver multiple video connections by means of a single relationship with a video provider.

High-Speed Data Services

We offer high-speed Internet services to residential and SMB customers at download speeds ranging from 1.5 megabits per second ("Mbps") to 20 Mbps in all of our markets, and up to 60 Mbps in selected markets. Our data services include Internet access, email and webmail, Internet security, and other web-based services.

Voice Services

We provide local, long distance, and international voice telephone services. We offer a full range of calling plans that generally include unlimited local, regional, and long distance calling with a variety of calling features. Our voice service features include voicemail, caller identification, call waiting, call forwarding, 3-way calling, 911 access, operator services, and directory assistance. We provide voice services through a traditional, switched platform to our legacy phone customers, and for our newer phone customers, including all new installations, we use a "digital phone" architecture that transmits data signals over our broadband network between the customer premises and an RCN switch, which then interfaces with the public switched telephone network.

RCN and RCN Business Services Network

Our RCN and RCN Business Services network architecture consists of a hybrid-fiber-coax network predominantly designed and built to support a bandwidth of 860 Megahertz. This architecture enables us to offer video, high-speed data, and local and long distance voice services to customers over a common network infrastructure. Our network also supports two-way interactive services such as VOD and linear pay-per-view services, as well as higher bandwidth high-definition video services. The conversion to an all-digital video platform has allowed us to reallocate bandwidth on our network and to launch expanded and enhanced programming services.

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

Our distribution network relies on service nodes, which receive video, data and voice signals from our fiber optic network and transmit those signals along our coaxial "last mile" distribution cables to customers' premises. Our fiber cable entering any particular service node typically reaches to within 1,000 feet of the customers' premises, and the node service area typically consists of approximately 150 homes or small business locations. This small node service area combined with the deep fiber architecture provides for better operational performance of our network and also provides higher bandwidth per home than the traditional network design of other cable and telecommunication service providers.

Our data network consists of the networking and computer equipment required to provide complete internet service provider ("ISP") services to both our residential and SMB customers. We maintain an Internet backbone network that is used to interconnect to both settlement-free and settlement-based carriers. During the fourth quarter of 2009, we launched DOCSIS 3.0 in our New York market, offering download speeds of up to 60Mbps and upload speeds of up to 10Mbps. We expect to deploy DOCSIS 3.0 in our remaining markets over the next 18 months, which will include upgrades enabling us to offer even higher upload and download speeds.

We also maintain a carrier grade voice network that is capable of delivering high-quality voice services to residential and SMB customers. We provide voice services to our legacy phone customers through a traditional, circuit-switched platform, which uses our fiber-optic backbone facilities with synchronous optical network ("SONET") transport electronics to provide interconnection from the RCN local telephony switch to the telephony distribution electronics. Our circuit-switched voice network provides primary line service with full interconnection to the local emergency 911 centers and includes reserve batteries in the network or at the customers premise to provide backup power in the event of a commercial power outage. For our newer phone customers, including all new installations, we use a "digital phone" architecture that transmits data signals over our broadband network between the customer premises and the RCN local telephony switch, which then interfaces with the public switched telephone network. During 2009, we purchased a MetaSwitch SoftSwitch, to begin our migration to an all-IP telephony platform. Residential customers will see the benefits of an enhanced calling feature set, including advanced voicemail and messaging services, while SMB customers will have access to a full suite of business grade features, as well as Hosted IP PBX and SIP Trunking. We expect to begin deployment of the SoftSwitch platform during the second quarter of 2010 in our New York Market, with additional deployments expected in our remaining markets over the next two years.

Competition

We compete with a wide range of service providers in each market, including incumbent local exchange carriers ("ILECs"), incumbent multiple system cable operators ("MSOs"), Direct Broadcast Satellite ("DBS") providers, wireless providers and competitive telecommunications and Internet service providers. In recent years, competition has increased significantly for video, voice and data services in our markets, and we believe it will continue to intensify in the future. Our primary competitors, particularly Comcast, Time Warner, Verizon and AT&T possess significantly greater financial resources than we do, which they are using to fund substantial network expansions and upgrades, as well as product and service enhancements, and because we are presently unable to match this level of overall investment, we rely on our ability to provide

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

more personalized and effective services to our customers and to operate more efficiently to compete against these companies.

Our primary competition for video services consists of incumbent MSOs and ILECs named above in our metro markets, Service Electric in Lehigh Valley, PA, and the DBS providers, DirecTV and Dish Network. We also, to a lesser degree, compete with interactive broadband services, wireless and other emerging technologies that provide for the distribution and viewing of video programming, as well as home video products.

Our primary competition for voice and high-speed Internet services consists of incumbent MSOs and ILECs named above in our metro markets, Service Electric in Lehigh Valley, PA, Competitive Local Exchange Carriers ("CLECs"), VoIP service providers, and wireless providers.

RCN Metro Segment

In 2009, our RCN Metro segment generated approximately 25% of our consolidated revenues (see Note 15 "Financial Data by Business Segment" to our Consolidated Financial Statements). Through our RCN Metro segment, we offer commercial transport products and services to large enterprise and carrier customers. We distinguish RCN Metro in our markets by offering high-bandwidth, high-availability, diverse and redundant solutions for our customers, as well as superior customer service and technical responsiveness. Our RCN Metro network includes numerous unique fiber routes, making us an attractive provider of telecommunications services to critical customer locations that require redundant and diverse communications solutions.

Our enterprise customers are generally large corporations, financial, healthcare and educational institutions, and government agencies seeking high-bandwidth data transport services. We target Fortune 1000 companies and work closely with enterprise clients to develop custom telecommunications solutions that leverage our network and operational expertise. We have developed significant expertise in meeting the telecommunications needs of financial services firms, with several stock exchanges and major banks among our customers. Enterprise customers represent approximately 40% of RCN Metro's revenue.

Our carrier customers are telecommunications services companies, including ILEC's, CLEC's, and other service providers, who utilize our services to provide redundancy for their own networks and to develop customer-specific applications. Wireless communications providers are among our largest carrier customers, to whom we provide backhaul transport services to aggregate traffic from their geographically-dispersed cell sites and switch sites. Carrier customers represent approximately 60% of RCN Metro's revenue.

RCN Metro Products

Our commercial product offerings include metro and intercity SONET, dense wavelength division multiplexing ("DWDM"), and Ethernet based transport services, co-location services, and IP services. Following the initiation of RCN Metro service to a customer in any building, we target other potential customers in that building to deliver higher margin, incremental products and services to multiple customers located in that building.

- *Transport Services:* We provide SONET and Ethernet-based data transport services both within our metro markets and between cities over our intercity fiber network. Specific service offerings

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

include: SONET Private Line services at bandwidth levels including DS-1, DS-3, OC-3, OC-12, OC-48, and OC-192; Wavelength (DWDM) services enabling flexible and scalable high-capacity transport at 1.25, 2.5 and 10 Gbps; and Ethernet services via dedicated, point-to-point as well as point-to-multipoint connectivity. We offer these services utilizing a variety of equipment platforms, enabling us to deliver services to customers in their preferred telecommunications architecture, including Cisco, Nortel, Lucent, and Ciena equipment.

- *Co-Location Services:* We offer co-location services to our customers by maintaining secured and monitored technical space in the same facilities as several of our larger network operations locations. We offer full disaster recovery and data back-up capabilities in facilities that help assure maximum server and data availability, as well as customized monitoring, maintenance and hosting services, and provide cost-effective pricing for customers who desire to combine co-location and hosting services with our data transport services.

- *Internet Access:* Our Internet access offerings include dedicated access services targeted at businesses that desire single or multipoint high-speed, dedicated connections to the Internet. Our dedicated Internet access service provides internet speeds of up to a Gigabit per second. We maintain numerous public and private peering arrangements with other Internet backbone networks in our geographic footprint.

RCN Metro Network

RCN Metro's network is a fiber-based, highly redundant, survivable network optimized to deliver carrier grade telecommunications services to enterprise and carrier customers. The RCN Metro fiber-optic network is comprised of fiber owned by RCN and fiber leased from third party providers, typically under long-term leases. The majority of RCN Metro's fiber route miles are leased, while the majority of RCN Metro's fiber strand miles are owned. In several of our markets, the majority of our commercial fiber cable deployed is placed in entirely separate conduit facilities from those of the incumbent service providers, providing a major competitive differentiator and selling point for our enterprise and carrier customers. In other cases, we utilize the rights-of-way provided by incumbent telecommunications and utility providers, or our own facilities in public rights-of-way. The acquisition of NEON substantially extended the reach of our RCN Metro network, adding intercity transport routes that extend from Maine to Virginia. Several of these newly added routes follow geographic paths that are diverse from the I-95 corridor along which many of the industry's existing north-south telecommunications facilities traditionally follow.

A substantial majority of our RCN Metro revenue is earned using network routes and equipment that are distinct from our RCN and RCN Business Services network assets. We are able, however, to leverage the deeply penetrated fiber footprints of our RCN and RCN Business Services networks to deliver high-bandwidth enterprise and carrier products to additional locations. In addition, we maintain two separate RCN Metro network operations centers, staffed by telecommunications engineers and operations professionals trained specifically to support RCN Metro customers. Finally, the design, installation, support, and disconnection of RCN Metro services are performed by technicians trained specifically to work in our RCN Metro network environment. We utilize common back-office support services with our RCN and RCN Business Services units to obtain cost efficiencies while maintaining our focus on enterprise and carrier customers.

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

Our RCN Metro network was designed to provide highly redundant fiber facilities between key customer locations within the central business districts of the major cities and regions in which we operate. Our fiber network is comprised of approximately 10,000 miles of fiber cable routes, offering approximately 335,000 fiber miles of network capacity. Our services are delivered over fiber optic cable installed, monitored, and maintained entirely by RCN. We currently deliver fiber-based communications services to approximately 1,500 on-net locations, including connections to more than 144 ILEC central offices and 24 co-location facilities.

Competition

Our RCN Metro business unit competes against the largest ILECs, CLECs, and other data transport providers, including Verizon Business, AT&T, Qwest, Level 3 Communications, and AboveNet. The ILECs, in particular, have significant advantages over RCN Metro, including greater capital resources, local networks in many markets where we do not have facilities, and longstanding customer relationships, particularly in buildings that we have not previously serviced. We also face competition from smaller competitive access providers, CLECs and other new entrants. We seek to distinguish our products by offering diverse network paths, redundancy, superior care and technical responsiveness, and value-added product offerings, such as co-location, tailored to the needs of our customers.

Risk Factors

We have a history of net losses and we emerged from Chapter 11 reorganization in 2004.

In each period since we emerged from bankruptcy in 2004, we have incurred net losses. For 2009, 2008 and 2007, we have reported net losses of \$28.6 million, \$70.7 million and \$152.0 million, respectively. Our net losses are principally attributable to insufficient revenue to cover our operating expenses, which we expect will remain significant.

Our markets are highly competitive, and many of our competitors have significant advantages. We may not be able to respond quickly or effectively to changes in the competitive environment, which could have a material adverse impact on our results of operations and financial position.

In particular, we face increasing competition from incumbent telephone companies. For example, Verizon and other competitors now offer video services in several of our service areas and are expected to continue deploying video services in most of our remaining service areas in the next several years. Incumbent telephone companies' competitive position has been improved by recent operational, regulatory and legislative advances. The attractive demographics of our major urban markets make many of our service areas desirable locations for investment in video distribution technologies by both incumbents and new entrants. By the nature of our relatively mature markets, the introduction of a viable new entrant will increase competitive intensity, leading to downward pricing pressure on, and customer losses for, the prior market competitors. For example, during 2008 and 2009, while we grew revenue on a consolidated basis, we lost video connections, customers and revenue in the geographic areas where Verizon offered video service. While these declines did not have a material impact on our consolidated results of operations, we cannot predict the extent to which increased competition, particularly from large incumbents, will impact our results of operations in the future.

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

We may be unable to successfully anticipate and respond to various competitive factors affecting our industry, including regulatory changes that may affect our competitors differently from us, new technologies and services that may be introduced, changes in consumer preferences, demographic trends and discount pricing strategies by competitors, which could have a material adverse impact on our results of operations and financial position.

Programming costs have risen in past years and are expected to continue to rise, and we may not be able to pass such programming costs through to our customers, which could adversely affect our cash flow and operating margins.

The cost of obtaining programming is the largest operating cost associated with providing our video service. These costs have increased each year, and we expect them to continue to increase, especially the costs associated with sports programming.

Programming costs may also be impacted by certain consolidations as cable systems acquire certain programming channels. The terms of many of our programming contracts are for multiple years and provide for future increases in the fees we must pay. In addition, local over-the-air television stations are increasingly seeking substantial fees for retransmission of their stations over our cable networks. Historically, we have absorbed increased programming costs in large part through increased prices to our customers. We cannot assure you that competitive and other marketplace factors will permit us to continue to pass through these costs, particularly as an increasing amount of programming content is available via the Internet at little or no cost.

Despite our efforts to manage programming expenses, we cannot assure you that the rising cost of programming will not adversely affect our cash flow and operating margins. In addition, programming costs are generally related directly to the number of subscribers to which the programming is provided. Larger cable and DBS systems generally pay lower per subscriber programming costs than we do. This cost difference can cause us to suffer reduced operating margins as prices decrease, while our competitors will not suffer similar margin compression due to their generally lower costs. In addition, as programming agreements come up for renewal, we cannot assure you that we will be able to renew these agreements on comparable or favorable terms. To the extent that we are unable to reach acceptable agreements with programmers, we may be forced to remove programming from our lineup, which could result in a loss of customers and materially adversely affect our results of operations and financial condition.

The covenants in our credit agreement restrict our financial and operational flexibility.

Our credit agreement imposes operating and financial restrictions that affect our ability to, among other things:

- incur additional debt;
- create liens on our assets;
- make particular types of investments or other restricted payments;
- engage in transactions with affiliates;
- acquire assets or make certain capital expenditures;
- utilize proceeds from asset sales for purposes other than debt reduction, except for limited exceptions for reinvestment in our business;

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

- merge or consolidate or sell substantially all of our assets; and
- pay dividends or repurchase shares of our common stock.

These requirements may affect our ability to finance future operations or to engage in other beneficial business activities.

These restrictions may also limit our flexibility in planning for, or reacting to, changes in market conditions and cause us to be more vulnerable in the event of a downturn in our business. If we violate any of these restrictions, we could be in default under our credit agreement and our creditors could seek to accelerate our repayment obligations and/or foreclose on our assets, either of which would materially and adversely affect our financial position.

The financial information presented in the table below comprises the audited consolidated financial information for 2009, 2008 and 2007.

	<u>Year Ended December 31,</u>		
	<u>2009</u>	<u>2008</u>	<u>2007</u>
	<i>(dollars in thousands)</i>		
Revenues	\$ 763,770	\$ 739,243	\$ 636,097
Costs and expenses:			
Direct expenses	275,240	264,219	224,770
Selling, general and administrative (including stock-based compensation of \$10,228, \$13,335 and \$33,206)	279,916	294,100	288,426
Exit costs and restructuring charges	575	2,314	8,194
Depreciation and amortization	<u>193,273</u>	<u>198,915</u>	<u>196,066</u>
Operating income (loss)	14,766	(20,305)	(81,359)
Investment income	395	2,880	9,424
Interest expense	(42,344)	(53,301)	(34,510)
Loss on the early extinguishment of debt	—	—	(63,795)
Other expense, net	<u>(363)</u>	<u>—</u>	<u>(451)</u>
Loss before income taxes	(27,546)	(70,726)	(170,691)
Income tax expense (benefit)	<u>1,072</u>	<u>—</u>	<u>(1,049)</u>
Net loss from continuing operations	(28,618)	(70,726)	(169,642)
Income from discontinued operations, net of tax	—	—	1,684
Gain on sale of discontinued operations, net of tax	<u>—</u>	<u>—</u>	<u>15,921</u>
Net loss	<u>\$ (28,618)</u>	<u>\$ (70,726)</u>	<u>\$ (152,037)</u>

Consolidated Operating Results

Consolidated Revenues

Consolidated revenue increased \$24.5 million, or 3.3%, in 2009 compared to 2008, primarily due to higher transport revenues in the RCN Metro segment and a slight increase in the average number of customers from 2008 to 2009 in the Residential/SMB segment.

Consolidated revenue increased \$103.1 million, or 16.2%, in 2008 compared to 2007, largely due to the acquisition of NEON. In 2007, the Company recorded a \$4.4 million benefit related to a

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

reciprocal compensation agreement. On a pro forma basis, and excluding the \$4.4 million benefit, consolidated revenue increased \$43.2 million, or 6.2%, in 2008 as compared to the same period in 2007, primarily due to an increase in the number of customers in the Residential/SMB segment and higher transport revenues in the RCN Metro segment.

Consolidated Direct Expenses

Consolidated direct expenses increased \$11.0 million, or 4.2%, in 2009 compared to 2008. Direct expenses include net benefits from favorable settlements with voice and data network providers related to ordinary course network cost disputes totaling \$4.0 million during 2009 and \$1.9 million during 2008. Excluding these benefits, consolidated direct expenses increased \$13.1 million, or 4.9%, in 2009 compared to 2008, primarily due to an increase in the average programming cost per subscriber in the Residential/SMB segment as well as added costs associated with the increase in revenue in the RCN Metro segment.

Consolidated direct expenses increased \$39.4 million, or 17.6%, in 2008 compared to 2007, primarily due to the acquisition of NEON. On a pro forma basis, consolidated direct expenses increased \$14.2 million, or 5.7%, in 2008 compared to 2007 as a result of an increase in the average programming cost per subscriber in the Residential/SMB segment and an increase in customers and revenue in the RCN Metro segment as well. Direct expenses also include net benefits from favorable settlements with voice and data network providers related to ordinary course network cost disputes totaling \$1.9 million and \$2.2 million in 2008 and 2007, respectively.

Consolidated Selling, General and Administrative Expenses

Consolidated selling, general and administrative expenses ("SG&A") decreased \$14.2 million, or 4.8%, in 2009 compared to 2008. Excluding stock-based compensation, SG&A expense decreased \$11.1 million, or 4.0%, in 2009 compared to 2008, primarily reflecting (i) the results of the investments made in 2008 and 2009 to improve the long-term productivity and effectiveness of field operations, and the marketing and sales functions in the Residential/SMB segment, which were partially offset by increases in property tax and collections expense and (ii) synergies associated with the integration of the NEON business acquired in November 2007 in the RCN Metro segment. In addition, SG&A expenses decreased by \$2.2 million in 2009, as compared to 2008, due to the suspension of the Company's matching contribution to the 401(k) plan in the beginning of the second quarter of 2009.

Consolidated SG&A increased \$5.7 million, or 2.0%, in 2008 compared to 2007, primarily due to the acquisition of NEON partially offset by a decrease in stock-based compensation expense of \$19.9 million. On a pro forma basis, and excluding stockbased compensation, SG&A increased by \$1.2 million, or 0.4%, in 2008 compared to 2007, reflecting increases in bad debt expense, property taxes and legal costs, partially offset by a decline in certain general and administrative expenses, primarily due to the integration and synergies achieved through the NEON acquisition.

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

Residential/SMB Metrics

	<u>2009</u>	<u>2008</u>	<u>2007</u>
Video RGUs (1)	364,000	366,000	358,000
Data RGUs (1)	312,000	302,000	285,000
Voice RGUs (1)	223,000	244,000	250,000
Total RGUs (1)	899,000	911,000	893,000
Customers (2)	429,000	428,000	416,000
ARPC (3)	\$ 110	\$ 110	\$ 109

(1) Revenue Generating Units ("RGUs") are all video, high-speed data, and voice connections provided to residential households and SMB customers. Dial-up Internet and long distance voice services are not included. Additional telephone lines are each counted as an RGU, but additional room outlets for video service are not counted. For bulk arrangements in 27 residential multiple dwelling units ("MDUs"), including dormitories, the number of RGUs is based on the number of video, high-speed data and voice connections provided and paid for in that MDU. Commercial structures such as hotels and offices are counted as one RGU regardless of how many units are in the structure. Delinquent accounts are generally disconnected and no longer counted as RGUs after a set period of time in accordance with our credit and disconnection policies. RGUs may include customers receiving some services for free or at a reduced rate in connection with promotional offers or bulk arrangements. RGUs provided free of charge under courtesy account arrangements are not counted, but additional services paid for are counted.

(2) A "Customer" is a residential household or SMB that has at least one paid video, high-speed data or local voice connection. Customers with only dial-up Internet or long distance voice service are not included. For bulk arrangements in residential MDUs, including dormitories, each unit for which service is provided and separately paid for is counted as a Customer. Commercial structures such as hotels and offices are counted as one Customer regardless of how many units are in the structure. Delinquent accounts are generally disconnected and no longer counted as Customers after a set period of time in accordance with our credit and disconnection policies.

(3) Average revenue per customer ("ARPC") is total revenue for a given monthly period (excluding dial-up Internet, reciprocal compensation and commercial revenue) divided by the average number of Customers for the period. This definition of ARPC may not be similar to ARPC measures of other companies.

Residential/SMB Revenues

Residential/SMB revenue increased \$6.1 million, or 1.1% in 2009 compared to 2008. The increase is primarily due to a slight increase in the average number of customers from 2008 to 2009. Total RGUs decreased by approximately 12,000, or 1.3%, from December 31, 2008 to December 31, 2009, driven primarily by voice penetration losses, consistent with trends for highly penetrated landline voice providers, partially offset by growth in data RGUs. Video RGUs decreased slightly from December 31, 2008 to December 31, 2009. ARPC was flat at \$110 in both 2009 and 2008, as growth in average revenue per video RGU and increased high-speed data penetration was offset by declines in voice penetration and average revenue per data RGU. The increase in average revenue per video RGU was driven mainly by our annual video rate increase, which partially mitigates the impact of annual increases in programming costs, as well as increased penetration of our digital set-top, HD and DVR boxes.

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

Our digital video penetration rate rose to 100% of video customers in the fourth quarter of 2009 from 87% in the fourth quarter of 2008, as we completed Project Analog Crush. The decrease in average revenue per data RGU was primarily due to a shift towards lower-speed data plans, a trend which has increased over the past year.

Residential/SMB revenue increased \$21.7 million, or 4.0%, in 2008 compared to 2007. Excluding a \$4.4 million benefit related to a reciprocal compensation agreement recognized in 2007, Residential/SMB revenue increased \$26.1 million, or 4.8%, during 2008 as compared to 2007. The increase is primarily due to an increase in the average number of customers and ARPC.

Customers increased by approximately 12,000, or 2.9%, from December 31, 2007 to December 31, 2008, primarily due to increased sales opportunities generated through investments in new and rebuilt homes, and increased focus on sales and marketing to SMB customers. Total RGUs grew by approximately 18,000, or 2.0%, from December 31, 2007 to December 31, 2008, driven primarily by overall customer increases, with data RGU growth outpacing video RGU growth. Voice RGUs declined consistent with industry trends. ARPC increased from \$109 for 2007 to \$110 for 2008 due primarily to growth in average revenue per video RGU and increased high-speed data penetration, partially offset by declines in average revenue per voice and data RGU. The increase in average revenue per video RGU was driven mainly by our annual video rate increase, as well as increased customer purchases of value added products and services such as our digital set-top, HD and DVR boxes, digital programming tier and premium channels. Our digital video penetration rate rose to 87% of video customers in the fourth quarter of 2008 from 69% in the fourth quarter of 2007. The decrease in average revenue per voice RGU was due to overall market pricing trends, where voice prices have consistently decreased over the past several years. The decrease in average revenue per data RGU was primarily due to an increase in the percentage of data RGUs representing lower-speed data plans, a trend which has increased since RCN introduced these plans in 2007.

Residential/SMB Direct Expenses

Direct expenses increased \$6.9 million, or 3.5%, in 2009 compared to 2008. Direct expenses include a net benefit from favorable settlements with voice and data network providers on ordinary course network cost disputes totaling \$4.0 million during 2009 and \$1.9 million during 2008. Excluding these settlements, Residential/SMB direct expenses increased \$9.0 million, or 4.5%, in 2009 compared to 2008. Increases in the average programming cost per subscriber resulted in an increase in video direct costs for 2009 totaling \$12.5 million as compared to 2008. Voice and data network costs in 2009, excluding the impact of settlements with providers of our voice and data network services, decreased by \$3.5 million, or 10.9%, primarily due to a reduction in voice RGUs and benefits achieved as a result of an ongoing network optimization initiative.

Direct expenses increased \$9.3 million, or 4.9%, in 2008 compared to 2007 primarily due an increase in the average

programming cost per subscriber and higher average video RGUs. Direct expenses for 2008 and 2007 include a net benefit of \$1.9 million and \$2.2 million, respectively, as a result of favorable

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

settlements with our voice and data network providers. Direct expenses for 2007 also include a charge of approximately \$1.5 million for franchise fees identified during an audit.

RCN Metro Revenues

Revenue increased \$18.4 million, or 10.7%, in 2009 as compared to 2008, primarily due to growth in transport services to our carrier and enterprise customers. RCN Metro had approximately 800 customers as of December 31, 2009. The top 20% of these customers had monthly revenue in excess of \$10,000 per customer, generating approximately 90% of RCN Metro's total revenue, and the top 3% of these customers had monthly revenue in excess of \$100,000 per customer, representing multiple locations and services purchased per customer, and generated approximately 60% of RCN Metro's total revenue. From a customer segment perspective, RCN Metro generates approximately 30% of its revenue each from telecommunications carriers, national wireless providers and financial services enterprise customers, and the remainder from other enterprise customers.

RCN Metro revenue increased \$81.5 million, or 90.7%, in 2008 as compared to 2007, primarily due to the acquisition of NEON. On a pro forma basis, revenue increased \$17.2 million, or 11.1%, in 2008 as compared to 2007, due primarily to growth in transport services to our carrier and enterprise customers.

While RCN Metro's revenue is somewhat concentrated within certain industries and customers, we attempt to mitigate any potential risk by performing detailed credit analyses on new customers and by aggressively managing outstanding accounts receivable balances and customer payments. In addition, our core product set often supports mission critical customer applications (e.g., trading operations, voice/data traffic aggregation, core network connectivity, etc.), which positions us well relative to other suppliers.

RCN Metro Direct Expenses

Direct expenses increased \$4.1 million, or 6.3%, in 2009 as compared to 2008, largely due to added costs associated with the increase in revenue, including co-location costs and leased circuits, partially offset by a reduction in building access fees.

Direct expenses increased \$30.2 million, or 87.0%, in 2008 as compared to 2007, primarily due to the acquisition of NEON.

On a pro forma basis, direct expenses increased \$4.9 million, or 8.2%, for 2008, largely due to added costs associated with the increase in revenue, including leased circuits, building access, rights-of-way and co-location costs.

Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009

RCN CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF CASH FLOWS
(Dollars in thousands)

	<u>Year Ended December 31,</u>		
	<u>2009</u>	<u>2008</u>	<u>2007</u>
Cash flows from operating activities:			
Net loss	\$ (28,618)	\$ (70,726)	\$ (152,037)
Income from discontinued operations, net of tax	—	—	(1,684)
Gain on sale of discontinued operations	—	—	(15,921)
Net loss from continuing operations	(28,618)	(70,726)	(169,642)
Adjustments to reconcile net loss to net cash provided by operating activities:			
Non-cash stock-based compensation expense	10,228	13,335	33,206
Loss on early extinguishment of debt	—	—	63,795
Amortization of debt issuance costs	1,687	1,685	740
Deferred income taxes, net	764	—	(1,049)
Depreciation and amortization	193,273	198,915	196,066
Provision for doubtful accounts	16,387	16,384	10,880
Exit costs and restructuring charges	84	(2,699)	2,460
Net change in certain assets and liabilities, net of business acquisitions:			
Accounts receivable and unpaid revenues	(18,933)	(13,305)	(12,560)
Accounts payable and accrued expenses	(17,142)	(117)	(13,744)
Advanced billing and customer deposits	(1,868)	(7,670)	338
Other assets and liabilities	(2,945)	4,169	(1,802)
Net cash provided by continuing operations	152,917	139,971	108,688
Cash provided by discontinued operations	—	—	476
Net cash provided by operating activities	152,917	139,971	109,164
Cash flows from investing activities:			
Additions to property, plant and equipment	(118,255)	(143,252)	(115,510)
Investment in acquisitions and intangibles, net of cash acquired	—	—	(261,843)
Decrease (increase) in short-term investments	37,841	(7,144)	12,268
Proceeds from sales of property, plant and equipment	974	1,850	1,955
Proceeds from sale of discontinued operations and other assets	—	2,500	46,877
Decrease in restricted investments	3,705	7,396	754
Net cash used in continuing operations	(75,735)	(138,650)	(315,499)
Cash used in discontinued operations	—	—	(243)
Net cash used in investing activities	(75,735)	(138,650)	(315,742)
Cash flows from financing activities:			
Payments of long-term debt, including debt premium and capital lease obligations	(7,352)	(7,338)	(219,480)
Payment of debt issuance cost	(16)	(67)	(13,944)
Proceeds from bank debt	—	5,000	745,000
Dividend payments	(819)	(1,613)	(348,380)
Proceeds from the exercise of stock options	—	397	5,793
Cost of common shares repurchased	(7,301)	(7,722)	(3,639)
Purchase of treasury stock	(664)	(993)	(3,321)
Net cash (used in) provided by financing activities	(16,152)	(12,336)	162,029
Net increase (decrease) in cash and cash equivalents	61,030	(11,015)	(44,549)
Cash and cash equivalents at beginning of period	10,778	21,793	66,342
Cash and cash equivalents at end of period	\$ 71,808	\$ 10,778	\$ 21,793

Financial Projections

CONFIDENTIAL

Cable Cash Flow Projections

CONFIDENTIAL

Section 5.1(a) Capital Expenditure Budget

Year Ended December 31, 2010

CONFIDENTIAL

EBIT and Cash Flow Analysis of Consultants

2001 - 2014

CONFIDENTIAL

Exhibit 5

FCC 328

For FCC Use Only

CERTIFICATION OF FRANCHISING AUTHORITY TO REGULATE BASIC CABLE SERVICE RATES AND INITIAL FINDING OF LACK OF EFFECTIVE COMPETITION

1 Name of Franchising Authority City of Boston, MA		
Mailing Address 43 Hawkins Street Office of Cable Comm.		
City Boston	State MA	ZIP Code 02114
Telephone No. (include area code): 617.635.3112		
Person to contact with respect to this form: Michael Lynch		

3 Will your franchising authority adopt (within 120 days of certification) and administer regulations with respect to basic cable service that are consistent with the regulations adopted by the FCC pursuant to 47 U.S.C. Section 543(b)? ☒ Yes ☐ No

4 With respect to the franchising authority's regulations referred to in question 3,

a. Does your franchising authority have the legal authority to adopt them? ☒ Yes ☐ No

b. Does your franchising authority have the personnel to administer them? ☒ Yes ☐ No

5 Do the procedural laws and regulations applicable to rate regulation proceedings by your franchising authority provide a reasonable opportunity for consideration of the views of interested parties? ☒ Yes ☐ No

6 The commission presumes that the cable systems listed in 2b is (are) not subject to effective competition. Based on the definition below, do you have reason to believe that this presumption is correct? ☒ Yes ☐ No

(Effective competition means that (a) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; (b) the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributors exceeds 15 percent of the households in the franchise area; or (c) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in the franchise area; or (d) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area. 47 C.F.R. § 76.905.)

2a Name(s) and address(es) of cable system(s) and associated FCC community unit identifier(s) within your jurisdiction. (Attach additional sheets if necessary.)


Cable System's Name Comcast Cable Comm. Inc.		
Mailing Address Attn: VP Govt. & Comm. Rel. 426 East 1st St.		
City South Boston	State MA	ZIP Code 02127
Cable System's FCC Community Unit Identifier: CUID MA 0182		

Cable System's Name		
Mailing Address		
City	State	ZIP Code
Cable System's FCC Community Unit Identifier:		

2b Name(s) of system(s) and associated community unit identifier(s) you claim are subject to regulation and with respect to which you are filing this certification. (Attach additional sheets if necessary.)

Name of System Comcast
Name of System

2c Have you served a copy of this form on all parties listed in Item 2? ☒ Yes ☐ No

Signature 
Title Director, Major, Cable
Date May 9th, 2011

**WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE
PUNISHABLE BY FINE AND / OR IMPRISONMENT
(U.S. CODE TITLE 18, SECTION 1001).**

Return the original and one copy of this certification form (as indicated in the Instructions for FCC 328), along with any attachments, to:

Federal Communications Commission
Attn: FCC form 328 Cable Franchising Authority Certification
445 12th Street, SW
Washington, DC 20554